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## FOREWORD

JUSTICE ANTONIN SCALIA

In introducing these essays devoted to the philosophy of constitutional interpretation known as originalism, it would be foolish to pretend that that philosophy has become (as it once was) the dominant mode of interpretation in the courts, or even that it is the irresistible wave of the future. The interpretive philosophy of the “living Constitution”<sup>1</sup>—a document whose meaning changes to suit the times, as the Supreme Court sees the times—continues to predominate in the courts, and in the law schools. Indeed, it even predominates in the perception of the ordinary citizen, who has come to believe that what he violently abhors must be unconstitutional. It is no easy task to wean the public, the professoriate, and (especially) the judiciary away from such a seductive and judge-empowering philosophy.

But progress has been made. Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers. By and large, counsel did not know I was an originalist—and indeed, probably did not know what an originalist was. In their briefs and oral arguments on constitutional issues they generally discussed only the most recent Supreme Court cases and policy considerations; not a word about what the text was thought to mean when the people adopted it. If any light was to be shed on the latter question, it would be through research by me and my law clerks. Today, the secret is out that I am an originalist, and there is even a second one sitting with me, Justice Clarence Thomas. Rarely, nowadays, does counsel fritter away two out of nine votes by failing to address what Justice Thomas and I consider dispositive. Originalism is in the game, even if it does not always prevail.

Sometimes, moreover, it does prevail, as in *Crawford v. Washington*,<sup>2</sup> a thoroughly originalist Supreme Court opinion that

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1. *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J., dissenting).

2. 541 U.S. 36 (2004)

brought the Confrontation Clause<sup>3</sup> back to its moorings after twenty-four years adrift in the Sea of Evolutionism had reduced it to nothing more than a guarantee that hearsay accusations would bear unspecified "indicia of reliability."<sup>4</sup> Or in *Apprendi v. New Jersey*,<sup>5</sup> where fidelity to the original meaning of the Sixth Amendment's jury-trial guarantee put an end to a movement in both state and federal legislation to impose mandatory sentence enhancements (i.e., additional jail time) on the basis of aggravating facts found to be true only by a judge, and by a mere preponderance of the evidence.<sup>6</sup> (Both of these significant cases, by the way, give the lie to the frequently heard contention that originalism is nothing more than a device to further conservative views.) In other cases, even when what I would consider the correct originalist position has not carried the day, the debate between the majority and dissenting opinions has been carried on in originalist terms.<sup>7</sup> Bad originalism is originalism nonetheless, and holds forth the promise of future redemption.

In the law schools as well, originalism has gained a foothold. I used to be able to say, with only mild hyperbole, that one could fire a cannon loaded with grapeshot in the faculty lounge of any major law school in the country and not strike an originalist. That is no longer possible. Even Harvard Law School, the flagship of legal education (I can say that because I am a HLS graduate) has, by my count, no less than three originalists on its faculty (no names, please). Twenty years ago there was none. Not that all law schools, or even a majority of law schools have originalist professors; but being an originalist is no longer regarded as intellectually odd, if not un-intellectual.

To be sure, not all developments have been encouraging. American constitutional evolutionism has, so to speak, metastasized, infecting courts around the world. The American Supreme Court's "living Constitution" now finds its correlative in the Canadian Supreme Court's "living tree,"<sup>8</sup> and in the pronouncement of the European Court of Human Rights that the

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3. U.S. CONST. amend. VI.

4. *Crawford*, 541 U.S. at 40 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

5. 530 U.S. 466 (2000).

6. *See id.* at 469–74.

7. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800–15 (1995); *id.* at 865–67 (Thomas, J., dissenting).

8. *Att'y Gen. of Can. v. Att'y Gen. of Que.*, [2005] 2 S.C.R. 669, 677, 2005 SCC 56 (Can.).

Convention it applies must “be interpreted in the light of current conditions.”<sup>9</sup> Increasingly, nowadays, foreign courts cite our opinions,<sup>10</sup> and we theirs,<sup>11</sup> because (I fear) judges in all countries believe they are engaged in the very same enterprise: not in determining the original meaning of the unalienable rights approved by the American people or the Canadian people or by the European nations that signed the Convention on Human Rights; nor even in determining what present-day Americans or Canadians or Europeans believe the human-rights provisions *ought* to mean; but in determining *for themselves* the *true* content of human rights, much as judges in common-law jurisdictions once believed they were all pursuing the same “brooding omnipresence”<sup>12</sup> of The Common Law. One might expect this international development to strengthen the conviction of our domestic evolutionary judges that they are on the right track (can we be wrong in pronouncing this new human right when the vast majority of the world’s judges agree with us?). It may be, however, that the sheer spectacle of our judges’ determining the meaning of the American Constitution by falling into step with the judges of foreign courts will bring home to the American people the profoundly undemocratic nature of the evolutionary enterprise.

In any case, there is reason to be hopeful. The upcoming generation of judges and lawyers will have been exposed to originalist thinking far more than was my own—if not through their law professors then through lectures and symposia sponsored by the Federalist Society; and if through neither of those then at least through the reading of originalist Supreme Court opinions and dissents. It is the very premise of our free system that, in a fair and equal competition of ideas, the truth will prevail. The essays in this Issue are directed to that end.

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9. *Kress v. France*, 2001-VI Eur. Ct. H.R. 41, 67–68.

10. *See, e.g., R. v. Mann*, [2004] 3 S.C.R. 59, 75–76, 2004 SCC 52 (Can.) (citing, *inter alia*, *Terry v. Ohio*, 392 U.S. 1 (1968)).

11. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

12. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).



## A CRITICAL INTRODUCTION TO THE ORIGINALISM DEBATE

STEVEN G. CALABRESI\*

Since its founding in 1982, the Federalist Society and many of its members have promoted originalism as the correct philosophy to use in interpreting the Constitution. The originalism debate is of central importance to the Society's mission of promoting the rule of law, constitutionally limited government, and the separation of powers. We believe that ours should be a government of laws and not one of men or of judges.

Over the last quarter century, originalism has been the subject of much discussion. That debate, which had been proceeding quietly in American law schools, burst into noisy and public view in July 1985 with a speech by then-Attorney General Edwin Meese III to the American Bar Association that called for a jurisprudence of original intention.<sup>1</sup> Supreme Court Justice William J. Brennan, Jr., entered the fray that October with an address at Georgetown University,<sup>2</sup> to which Meese responded the next month in a speech before the Federalist Society Lawyers Division.<sup>3</sup> These speeches remain among the most enduring statements of the originalist creed and its critics.

The originalism debate continues to be of central importance to the Federalist Society's mission. The Society celebrated the twentieth anniversary of Attorney General Meese's speech to its Lawyers Division by making originalism the theme of its 2005 National Lawyers Division Convention. This Issue of the

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1. Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 47 (Steven G. Calabresi ed., 2007).

2. Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *ORIGINALISM*, *supra* note 1, at 55.

3. Edwin Meese III, U.S. Att'y Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in *ORIGINALISM*, *supra* note 1, at 71.

*Harvard Journal of Law & Public Policy* includes essays developed from several of the panel presentations during that retrospective symposium. The essays show that the issues Ed Meese raised more than twenty years ago are still hotly contested. President George W. Bush's recent appointments of Reagan Administration alumni John Roberts as Chief Justice of the United States and Samuel Alito as an Associate Justice have led many to hope that there may now be four Supreme Court Justices sympathetic to originalism. Given the likelihood of multiple Supreme Court vacancies in the next several years, the symposium essays that follow address the question of what judicial philosophy we should look for in selecting new members of the Supreme Court. The reader will find in these pages the best and most brilliant defenders and opponents of the originalist creed. We hope these essays will inform and shape the ongoing great debate over the merits of constitutional originalism.<sup>4</sup>

The remainder of this Introduction offers a critical guide to the ideas raised by originalism's seminal speeches as well as an opinionated review of the symposium essays that follow.

## I. ATTORNEY GENERAL MEESE'S SPEECH TO THE ABA

The first theme of Attorney General Ed Meese's 1985 speech to the American Bar Association (ABA) was the primacy of the rule of law. Meese began by noting that Americans "pride ourselves on having produced the greatest political wonder of the world—a government of laws and not of men."<sup>5</sup> This emphasis on the rule of law is central to originalism. Originalists believe that the written Constitution is the fundamental law and that it binds everyone—even Supreme Court Justices. Those Justices

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4. The publication of these essays comes at a time when three brilliant originalist books have recently been published. THE HERITAGE GUIDE TO THE CONSTITUTION (Edwin Meese III et al. eds., 2005); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). Strikingly, the Meese and Amar books both go through the Constitution clause by clause from the Preamble through the Twenty-Seventh Amendment. The Barnett book offers a general originalist theory of constitutional law, which is sound on constitutional theory and enumerated powers, but faulty as to the Fourteenth Amendment. This flurry of originalist writing shows the continuing hold that the originalism debate has on the public mind even after nearly a quarter century.

5. Meese, *supra* note 1, at 47.

who abandon the original meaning of the text of the Constitution invariably end up substituting their own political philosophies for those of the Framers. Americans have to decide whether they want a government of laws or one of judges. Is the constitutional text going to bind the Supreme Court, or will the Justices in essence write and rewrite the text? Attorney General Meese came down squarely in favor of the idea “that the Constitution is a limitation on judicial power as well as executive and legislative” powers.<sup>6</sup>

The argument for the rule of law is in part that the alternative is to give judges too much discretion, which would produce large swings in constitutional law that would be destabilizing and undemocratic. But there is much more to it than that. Those who convert the Constitution into a license for judges to make policy pervert a document that is supposed to *limit* the exercise of power into one that *sanctions* it. For this reason, Meese rightly said that “[a] constitution that is viewed as only what the judges say it is no longer is a constitution in the true sense.”<sup>7</sup>

This leads to a second theme of Meese’s ABA speech, which was that the whole idea of constitutionally limited government itself is at stake in the originalism debate. If the original meaning of the text of the Constitution does not bind the Supreme Court, why should it bind the President or the Chairman of the Joint Chiefs of Staff? Once we abandon originalism in the Supreme Court, why not abandon it everywhere else as well? Such a decision is perverse because, as Meese pointed out, judges and Supreme Court Justices were supposed to be the “bulwarks of a limited constitution”<sup>8</sup> and not a French Revolution-style Committee of Public Safety that would legislate on the most sensitive issues of morality and religion by five-to-four votes without the limitations imposed on the legislature of bicameralism and presentment.<sup>9</sup> Indeed, the only reason judges have power to hold laws unconstitutional is because the Constitution is a higher law that binds legislative and executive officials and trumps unconstitutional actions those officials might take.<sup>10</sup> But if the Constitu-

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6. *Id.* at 54.

7. *Id.* at 53.

8. *Id.* at 47.

9. See U.S. CONST. art. I, § 7.

10. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–80 (1803).

tion does not bind the Justices, why should it bind the President or Congress? Accordingly, abandoning originalism means abandoning the rationale that *Marbury v. Madison* uses to justify judicial review. Without originalism there can be no constitutionally limited government and no judicial review.

Moreover, if we abandon originalism in constitutional interpretation, then why not abandon it with respect to interpreting all other legal writings, including statutes, contracts, wills, deeds, and even old Supreme Court decisions? How many non-originalists would defend the idea that lower federal court judges are not bound by the original meaning of Justice Blackmun's opinion in *Roe v. Wade*,<sup>11</sup> but are free instead to give that opinion a moral reading in light of today's evolving standards of decency? Not many. Yet, if non-originalism is right when it comes to Supreme Court interpretation of the People's Constitution, then surely it is right when district judges are applying made-up Supreme Court case law. The correct answer on this, as on so many other questions, was long ago expressed by Justice Joseph Story when he said, "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."<sup>12</sup>

## II. JUSTICE BRENNAN'S 1985 SPEECH AT GEORGETOWN UNIVERSITY

The main theme of Justice William Brennan's speech in response to Attorney General Meese was what he called the "transformative purpose" of the constitutional text,<sup>13</sup> which he argued "embodies the aspiration to social justice, brotherhood, and human dignity that brought this country into being."<sup>14</sup> Justice Brennan argued that Meese's vision of reading the text in light of its original meaning was "little more than arrogance cloaked as humility,"<sup>15</sup> because it was arrogant at our vantage point to claim that we could discern how the Framers would

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11. 410 U.S. 113 (1973).

12. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

13. Brennan, *supra* note 2, at 62.

14. *Id.* at 55.

15. *Id.* at 58.

apply the moral-philosophic natural law principles he thought they wrote into the Constitution to late twentieth-century problems. Justice Brennan added that

[w]e current Justices read the Constitution in the only way we can: as twentieth century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.<sup>16</sup>

To say that the genius of a constitution lies in the fluidity of its meaning is a little bit like saying that the genius of the brakes on your car is the way they can be used for acceleration. The whole point of having a constitution or a bill of rights in the first place is to memorialize and entrench certain fundamental rights so that they can prevail in moments of passion when a crazed mob might want to cast them aside. To praise the Constitution primarily for its ability to be adapted to current problems and needs is thus to overlook the very reasons why we entrenched principles in the Constitution in the first place. More fundamentally, there are four specific errors permeating Justice Brennan's reasoning that deserve elaboration.

The first error is that Justice Brennan totally cast aside the constitutional idea that it is feasible to have a system of intergenerational lawmaking, in which current generations agree to be bound by constitutional rules their great-grandfathers made so that they in turn can adopt new constitutional amendments that will bind their great-grandchildren. Justice Brennan denied that such intergenerational lawmaking was desirable, or indeed even feasible.<sup>17</sup> He believed the text of the Constitution was like the text of a poem, to which each generation of readers brings most of the meaning.<sup>18</sup> The fact of the matter is that there are many circumstances where it is essential that entrenched rules be in place in order for liberty to flourish. Who would go to the trouble of writing a controversial book if he could not

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16. *Id.* at 61.

17. *See id.* at 59–62.

18. *See id.* at 61. The "poem" analogy is the Author's, not Justice Brennan's.

know for sure that he would not be imprisoned for it in twenty years, in violation of the First Amendment? Who would work hard to start a business if he could not be certain that it would not be taken from him without just compensation, in violation of the Takings Clause?<sup>19</sup> Without the ability to entrench freedom of speech and of the press, or constitutional protections for private property rights, we would all have less freedom today. Each generation gives up something by agreeing to be bound by the rights its predecessors entrenched, yet gains something by being able to entrench new rights for its posterity. This system of intergenerational lawmaking would be completely undone if each generation read the Constitution like a poem to which it brought most of the meaning.

Justice Brennan's second error came with his dismissive talk about the undesirability of moderns being bound by "a world that is dead and gone."<sup>20</sup> Non-originalists frequently argue that none of us living today should be bound down by the "dead hand of the past,"<sup>21</sup> that is, by the Framers' Constitution. One might note, however, that there is a lot of law written by now-dead people on the books today by which even non-originalists assume we must be bound. No one argues that the Social Security laws or the Civil Rights Act of 1964 or the Sixteenth Amendment giving Congress the power to impose an income tax should be ignored because those laws were made by people who are now dead. For that matter, most non-originalists would be appalled by the suggestion that district judges should be free not to follow *Roe v. Wade* just because all nine Justices who participated in the decision of that case are now dead. Justice Brennan could not possibly have meant to dismiss all laws enacted by people who are now dead, because the result would be chaos. What he probably meant was that he and his fellow Justices ought to be able to pick and choose which laws written by dead people we are bound by and which ones we are not.

But this view would license the Supreme Court to conduct regular spring cleanings of the Constitution, throwing out some, but not most, of the laws made by the dead. Five out of nine Jus-

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19. U.S. CONST. amend. V.

20. Brennan, *supra* note 2, at 61.

21. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation* 58 S. CAL. L. REV. 277, 357 (1985).

tices would then have the power, for example, to eliminate the death penalty, even though a comparatively trivial bill to de-regulate the trucking industry would need to pass the House of Representatives, overcome a filibuster and pass the Senate, and then be signed by the President—or be passed by two-thirds majorities of both Houses over the President's veto—in order to become law.<sup>22</sup> What are the odds that the Framers, who created our cumbersome system for national law-making, meant to give five-to-four majorities of the Supreme Court the power to legislate on the most sensitive issues of morality and religion? Justice Brennan's position here is simply not credible.

Third, Justice Brennan accused originalists of acting with "arrogance cloaked as humility,"<sup>23</sup> but, in fact, it was his position that was arrogant. Justice Brennan's view was that the present generation is better than our benighted ancestors, exceeding them not only in technology but also in moral worth.<sup>24</sup> The American Constitution has survived for two centuries, is the oldest and first such document in existence, and has inspired countless spin-offs around the world. Is it not arrogant to dismiss the original meaning of that document lightly, as Justice Brennan did? We should not engage in ancestor worship, but the amended Constitution is nonetheless a good document that has carried Americans a long way and makes us still today the freest and most fortunate people in the world—the last best hope of man on Earth. It is not arrogant ancestor worship to respect such a text the way children respect their parents. It would, however, be arrogant to discard such a text and instead follow modern intellectual fads or one's personal proclivities.

Justice Brennan's final error was that he raised the level of generality of the Constitution in order to justify his desired left-wing outcomes. He described the Bill of Rights as protecting human dignity, for example, and then asked whether the death penalty is compatible with human dignity.<sup>25</sup> This is nothing more than the lawyerly sleight of hand used by Justice Douglas

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22. See U.S. CONST. art. I, § 7.

23. Brennan, *supra* note 2, at 58.

24. See *id.* at 63.

25. See *id.* at 63, 68.

in *Griswold v. Connecticut*.<sup>26</sup> The text of the Constitution does not speak vaguely of human dignity; it speaks specifically about freedom of speech and of the press,<sup>27</sup> about unreasonable searches and seizures,<sup>28</sup> and about property not being taken absent the payment of just compensation.<sup>29</sup> At the end of the day, Justice Brennan's primary concern was that the text of the Constitution be construed to produce what he deemed to be good consequences. Doing this makes "the rule of law and not of men" impossible, which leads to very bad long-term consequences. Playing games with the level of generality of the constitutional text to produce good consequences is as bad as saying that the nine Justices have commissions to legislate from the bench. Legislating from the bench turns out to be what Justice Brennan's speech was all about.

### III. ATTORNEY GENERAL MEESE'S 1985 SPEECH TO THE FEDERALIST SOCIETY

The first theme of Attorney General Meese's 1985 Federalist Society speech was the accessibility of the historical materials about the framing of the Constitution and its original meaning. Meese pointed out how incredibly young the United States is, how the Founding was not really that long ago, how the America of the 1780s was awash in pamphlets, newspapers, and books, how much writing was done by Federalists and Anti-Federalists during the ratification debates, and how detailed were the notes James Madison took of the deliberations at the Constitutional Convention.<sup>30</sup> As Meese noted, "the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis."<sup>31</sup> Additionally, the most authoritative sources of all for original-meaning textualists—dictionaries and grammar books from the 1780s—abound, and

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26. 381 U.S. 479, 484–85 (1965) (holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees" that "create zones of privacy" that a law against marital use of contraceptives unconstitutionally invades).

27. U.S. CONST. amend. I.

28. U.S. CONST. amend. IV.

29. U.S. CONST. amend. V.

30. Meese, *supra* note 3, at 72.

31. *Id.*

are easily consulted. We also have at our disposal legal textbooks used by the Framers, such as Blackstone's *Commentaries*, which shed light on the meaning of legal terms of art in the Constitution. And, for all the information available from the 1780s, even more information is available from the Civil War Era when the three critical Reconstruction amendments were adopted. In short, Justice Brennan was simply wrong to the extent that he portrayed the "period surrounding the creation of the Constitution [as] a dark and mythical realm."<sup>32</sup>

A second theme of Meese's Federalist Society speech was his close focus on the words of the constitutional text. Meese noted that the text is exactly specific in some places, such as where it requires that the President be at least thirty-five years old, is more general in other places, such as where it empowers Congress to regulate commerce and not merely trade and barter, and is still more general in other clauses, such as the Fourth Amendment's ban on unreasonable searches and seizures.<sup>33</sup> Meese was clear that it is the original meaning of the words, and not merely the intention of those who wrote them, that is the law:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.<sup>34</sup>

A third theme of Meese's Federalist Society speech was that the Constitution's "undergirding premise remains that democratic self-government is subject only to the limits of certain constitutional principles."<sup>35</sup> Part of what is at stake in the originalism debate is the power of cities, states, and Congress to exercise self-government. Representative democracy is one of the prime freedoms the Constitution protects, and a philosophy of constitutional interpretation that fails to protect democracy in its proper sphere is itself unconstitutional. The

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32. *Id.*

33. *Id.* at 73–74.

34. *Id.* at 76.

35. *Id.* at 75.

Constitution imposes very few limits on democratic government, and there are many foolish things that legislatures can do under our Constitution without violating that document at all. One of the chief flaws of Justice Brennan-style non-originalism is that it takes hotly contested issues like abortion out of the democratic process in the fifty states, where compromise is possible, and puts them under the power of the Supreme Court, which cannot produce compromise solutions. The constitutionalization and nationalization of the abortion dispute in *Roe v. Wade* has embittered the confirmation process for all federal judges and has roiled our politics for more than three decades. Whatever one's personal position on the abortion question, all Americans should be able to see that the Supreme Court's thirty-five-year effort to write a national abortion code has been a bitter and poisonous mistake.

A fourth and final theme of Meese's Federalist Society speech was that following Justice Brennan and construing the Constitution in light of evolving standards of human dignity can lead the Court badly astray.<sup>36</sup> We must never forget that *Dred Scott v. Sandford*,<sup>37</sup> *Lochner v. New York*,<sup>38</sup> and *Korematsu v. United States*<sup>39</sup> were all substantive due process decisions where the Court was guided by its own twisted ideas about what human dignity required. One could make a powerful case that the history of judicial review has been largely one of errors and tragedies. *Dred Scott* brought on the Civil War; the *Slaughter-House Cases*<sup>40</sup> and *Civil Rights Cases*<sup>41</sup> strangled the Fourteenth Amendment in its crib; *Plessy v. Ferguson*<sup>42</sup> sanctioned an era of state-sponsored segregation; *Lochner* delayed the implementation of progressive labor laws for decades; *Hammer v. Dagenhart*<sup>43</sup> delayed the implementation of laws against child labor for a generation; *Korematsu* sanctioned racially-discriminatory government concentration camps; and *Roe v. Wade*<sup>44</sup> led to the slaughter

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36. See *id.* at 77–79.

37. 60 U.S. 393 (1857).

38. 198 U.S. 45 (1905).

39. 323 U.S. 214 (1944).

40. 83 U.S. 36 (1872).

41. 109 U.S. 3 (1883).

42. 163 U.S. 537 (1896).

43. 247 U.S. 251 (1918).

44. 410 U.S. 113 (1973).

of millions of innocent human lives. In any rational cost-benefit analysis of the institution of judicial review over the last two hundred years, the tragedy side of the scales of justice is heavily weighed down. There is good reason, in short, to be very skeptical of Supreme Court Justices who promise to promote “human dignity.”

#### IV. PANEL ESSAYS ON ORIGINALISM AND PRAGMATISM

Pragmatic theories of constitutional interpretation have enjoyed renewed interest. Are they necessarily critiques of originalism, or can originalism be defended on pragmatic grounds? More generally, pragmatism asserts that the ultimate defense of constitutional law, like that of other human institutions, is the good it can do for people now. Can adherence to the original meaning of a two-hundred-year-old document still be defended as beneficial today? Essays from the first symposium panel address these questions and others.

Chief Judge Frank H. Easterbrook maintains that both pragmatism and originalism have roles in constitutional practice, albeit in distinct spheres.<sup>45</sup> Pragmatism is properly exercised by the political branches of government.<sup>46</sup> The Constitution is a short, old document, and cannot supply solutions for all problems.<sup>47</sup> Accordingly, it is up to Congress and the President—acting under the authority their election gives them—to provide pragmatic answers for modern difficulties.<sup>48</sup> Unelected judges, however, derive their power only from the Constitution itself. If they are to disapprove of a pragmatic choice by the elected branches, it must be because the higher law of the Constitution has denied them that choice.<sup>49</sup> Originalism, Judge Easterbrook contends, is the only interpretative approach that explains why judges have the final say under judicial review.<sup>50</sup>

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45. Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901 (2008).

46. *Id.* at 902–04.

47. *Id.* at 902.

48. *Id.* at 902–04.

49. *Id.* at 904–05.

50. *Id.*

Dean Larry Kramer argues that originalism is at odds with both history and pragmatism.<sup>51</sup> It is at odds with history because there was no original consensus as to the meaning of constitutional provisions, that is, no original “public meaning.”<sup>52</sup> Sharp disagreements arose, then as now, about the proper interpretation of various provisions and how to fill in the Constitution’s gaps and resolve its ambiguities.<sup>53</sup> A judge today professing to apply the original understanding of the Constitution is merely taking one side of a historical debate that the Framers themselves could not readily resolve.<sup>54</sup> Originalism is also at odds with pragmatism, Dean Kramer continues, because it ignores that whenever a constitutional provision is interpreted—by whatever method—it causes readjustments by other parts of government that change the constitutional structure in subtle (and unsubtle) ways.<sup>55</sup> Originalism asks judges to ignore such developments and look solely to the original constitutional “blueprint,” even if it no longer resembles its structure today.<sup>56</sup> Whatever this method’s virtues, Dean Kramer argues, it is surely *not* pragmatic.<sup>57</sup> The better method, he concludes, is to use the Constitution’s original understanding as a starting point, but also to recognize how subsequent generations have refashioned it to solve the problems of their day, before interpreting it to solve our own problems.<sup>58</sup>

Professors John O. McGinnis and Michael B. Rappaport argue that originalism and pragmatism are not incompatible because originalism *is* the most pragmatic method of constitutional interpretation, most likely to produce desirable results.<sup>59</sup> They emphasize the process for adopting constitutional provisions. Because ratifying the Constitution and its amendments requires supermajority votes, the norms they entrench enjoy

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51. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907 (2008).

52. *Id.* at 910–12.

53. *Id.* at 911.

54. *Id.* at 912–13.

55. *Id.* at 912–15.

56. *Id.* at 914–15.

57. *Id.*

58. *Id.* at 914–16.

59. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917 (2008).

broad, consensus support and tend to be desirable.<sup>60</sup> The only way to maintain these provisions' good consequences, however, is faithfully to adhere to their meaning as understood by the people who chose to entrench them in the Constitution.<sup>61</sup> Thus originalism allows judges to be pragmatic—that is, to achieve desirable consequences—without making policy case by case.<sup>62</sup>

Professor Jeffrey Rosen closes the first panel by arguing that neither originalism nor pragmatism is a meaningful restraint on judges in hard cases.<sup>63</sup> He notes that in cases involving difficult issues—affirmative action, federalism, and religion among them—discussion of history and original meaning is conspicuously absent or wanting, even from self-described originalists.<sup>64</sup> Pragmatism, too, is no certain restraint on judges: pragmatic jurists such as Justice O'Connor can be among the most activist.<sup>65</sup> The best way to promote democracy, Professor Rosen concludes, is judicial restraint expressed by a reluctance to strike down statutes enacted by the people's elected representatives.<sup>66</sup> In a word (or three), his preferred theory of interpretation is: "defer, defer, defer."<sup>67</sup>

Modern-day advocates of pragmatism as the correct theory of judicial decision-making think judges should give a lot of weight to the consequences their decisions produce.<sup>68</sup> There is an obvious problem with pragmatic, results-oriented judging, which is that it produces bad results by gutting the rule of law. *Robert's Rules of Order* informs us that "[w]here there is no law, but every man does what is right in his own eyes, there is the

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60. *Id.* at 919–24.

61. *Id.* at 924–27.

62. *Id.* at 931, 935.

63. Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 HARV. J.L. & PUB. POL'Y 937 (2008).

64. *Id.* at 939–42.

65. *Id.* at 942–44.

66. *Id.* at 944.

67. *Id.* at 938.

68. The leading advocates today of such a results-oriented jurisprudence are doubtless Justice Stephen Breyer and Judge Richard Posner. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); RICHARD A. POSNER, *OVERCOMING LAW* (1995).

least of real liberty.”<sup>69</sup> This statement is indisputably true. A Supreme Court whose Justices decide cases in a results-oriented way is nothing less than a nine-member French Revolution Committee of Public Safety. Why on Earth should the citizens of a democracy allow a committee of unelected lawyers to make binding rules on the most sensitive issues of morality and religion on a five-to-four vote based on their own personal moral and religious beliefs? Again, why especially should we allow this when laws implementing mundane matters like trucking deregulation must pass two Houses of Congress, overcome a filibuster in the Senate, and be either signed by the President or repassed by a two-thirds vote of both Houses?<sup>70</sup>

Telling judges to be policymakers is itself unpragmatic and will lead to bad results, not good ones. Judges are not good at making policy or judging consequences on a case-by-case basis. They have much less information at their disposal than do legislators because they cannot hold hearings, they cannot visit their home districts and talk to constituents, and they cannot engage in *ex parte* contact with experts. Because they are carefully insulated from popular sentiments,<sup>71</sup> judges have no incentive to find out and implement the will of the people.

What judges in theory might be good at is dispassionately interpreting legal texts and the deeply rooted traditions of the American people. They should stick to doing precisely that. Instead of worrying about the result in particular cases, judges should follow the rule of law in thousands of cases because doing so leads to better results than not doing so. The problem with Justice Breyer’s and Judge Posner’s consequentialism is that it produces bad consequences on a system-wide basis.

## V. PANEL ESSAYS ON ORIGINALISM AND PRECEDENT

Some have argued that precedent is impossible to reconcile with originalism because only the original understanding of the text matters, not later judicial interpretations of the text. Article VI of the Constitution makes only the Constitution itself, not Su-

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69. HENRY M. ROBERT, ROBERT’S RULES OF ORDER NEWLY REVISED, at v (Sarah C. Robert et al. eds., Perseus Publ’g 10th ed. 2000).

70. See U.S. CONST. art. I, § 7.

71. See U.S. CONST. art. III, § 1 (tenure and salary protections for federal judges).

preme Court case law, “the supreme Law of the Land.”<sup>72</sup> On the other hand, jurisprudential giants as diverse as Alexander Hamilton, James Madison, and Chief Justice John Marshall all seemed to put stock in precedent.<sup>73</sup> This symposium panel considers the role precedent ought to play for originalists, and whether precedent poses a greater problem for originalism than it does for other theories of constitutional interpretation.<sup>74</sup>

Professor Akhil Reed Amar describes the rival camps in the originalism-versus-precedent debate as “unoriginal originalists” and “unprecedented precedentialists.”<sup>75</sup> Unoriginal originalists, he says, pay close attention to text, history, and structure, but lack a definite theory about what to do when they conflict with precedent—sometimes following precedent, sometimes not.<sup>76</sup> Rather than simply “muddling through,” they should develop an originalist theory of precedent from the Constitution’s text, history, and structure itself.<sup>77</sup> Precedentialists, on the other hand, are “unprecedented”: the Court’s pronouncements on when it follows precedent, and when it does not, are often at odds with its earlier precedents on precedent.<sup>78</sup> Professor Amar concludes with his own theory of precedent, suggesting that the Supreme Court should treat its precedents as presumptively correct, noting that acceptance by earlier Justices is evidence that a precedent *is* the correct interpretation.<sup>79</sup> Nonetheless, when that presumption is rebutted—when the Justices are convinced a precedent is wrong—the Court should candidly admit that it has made a mistake.<sup>80</sup>

72. U.S. CONST. art. VI, § 1, cl. 2.

73. See R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S L.J. 1051, 1069 n.57 (1995).

74. The Author of this Introduction participated in this panel as both moderator and panelist. Accordingly, his views are stated in an essay appearing later in this Issue and will not be restated here. See Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL’Y 947 (2008).

75. Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL’Y 961, 961–62 (2008).

76. *Id.*

77. *Id.* at 961.

78. *Id.* at 961–62.

79. *Id.* at 965–66.

80. *Id.* at 965–67.

Professor David A. Strauss argues that conservatives actually should prefer following precedent to originalism.<sup>81</sup> The difficulties in ascertaining original understanding and applying it to modern problems leave questions too wide open, allowing judges to read their own views into the law while purporting to speak for the Framers.<sup>82</sup> If one is concerned about restraining judicial discretion, then one should emphasize adherence to precedent.<sup>83</sup> This requires judges to be candid when they overrule or extend precedent, forcing them to defend their reasons openly.<sup>84</sup> Originalism, on the other hand, tempts judges to decide cases according to their own views while using the “Framers’ understanding” as a shield against having to justify their decisions.<sup>85</sup> Only when judges must defend sweeping use of their powers will they be reluctant to exercise them.<sup>86</sup>

Professor Thomas W. Merrill gives more reasons why conservatives ought to support precedent over originalism.<sup>87</sup> Precedent provides thicker legal norms than originalism. It provides concrete answers to modern questions that original materials do not address, thus fostering greater consensus in deciding cases.<sup>88</sup> Precedential materials are also more accessible than materials from the Founding, facilitating efficient decision of cases.<sup>89</sup> In the same vein, reasoning from legal precedent is more in tune with the skill set of judges than reasoning from historical materials.<sup>90</sup> Finally, accepting precedents as final will change the tenor of judicial nominations. Although this would “lock in” precedents that conservatives oppose, such as the abortion cases, it would also lock in “good” precedents and make the courts less attractive generally for waging cultural and social

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81. David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008).

82. *Id.* at 970–71.

83. *Id.* at 973.

84. *Id.* at 974.

85. *Id.*

86. *Id.* at 974–76.

87. Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008).

88. *Id.* at 980.

89. *Id.*

90. *Id.* at 980–81.

battles.<sup>91</sup> The result, Professor Merrill concludes, would be less rancor and less ideological focus in judicial confirmations, allowing nominees' legal skills and temperament to take their proper place as the key criteria for selecting judges.<sup>92</sup>

The symposium panel on precedent concludes with an essay by Michigan Supreme Court Justice Stephen J. Markman, wherein he explains how his court's approach to precedent has reshaped Michigan law.<sup>93</sup> Although respectful of past decisions, the Michigan Supreme Court has resisted ratifying existing precedents when it has the opportunity to get the law right.<sup>94</sup> Its adherence to the plain, original meaning of constitutions and statutes has forced litigators to make textual arguments. It has also encouraged the state legislature to be more careful drafting legislation, because they know that the supreme court will hold them responsible for their work product and refuse to bail them out from poor decisions.<sup>95</sup> At the same time, it allows citizens to determine a law's meaning simply by reading it, instead of needing an attorney to discover the many unwritten exceptions judges have added to it.<sup>96</sup> This, Justice Markman says, "give[s] the people at least a fighting chance to comprehend the public rules by which they are governed."<sup>97</sup>

## VI. THE ORIGINAL MEANING OF THE COMMERCE, SPENDING, AND NECESSARY AND PROPER CLAUSES

Essays from the final symposium panel apply originalism to the central legal questions of federalism. What commentators have labeled "the modern federalism revolution"<sup>98</sup> began with the Court's construction of the Commerce Clause<sup>99</sup> in *United*

91. *Id.*

92. *Id.*

93. Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J.L. & PUB. POL'Y 983 (2008).

94. *Id.* at 984.

95. *Id.* at 985.

96. *Id.*

97. *Id.*

98. Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 314 (2004).

99. U.S. CONST. art. I, § 8, cl. 3.

*States v. Lopez*.<sup>100</sup> But recently the Court has upheld federal statutes on the basis of the Spending Clause<sup>101</sup> and the Necessary and Proper Clause.<sup>102</sup> Although Justice Thomas has written extensively about the original understanding of the Commerce Clause,<sup>103</sup> the Justices in general have spent little time exploring the original meaning of those clauses. Essayists from this panel consider the proper original understanding of all three clauses and whether that understanding can or should be revised to prevent Congress from exercising plenary authority.

Professor Michael Stokes Paulsen contends that the federal government's powers under the Constitution, while enumerated, are nonetheless broad enough to be effectively plenary.<sup>104</sup> This is because the Necessary and Proper Clause grants Congress sweeping power to enact laws it reasonably believes necessary to carry out the national government's other powers; as long as Congress's action falls within the fair range of the Constitution's text, judges are not empowered to strike it down.<sup>105</sup> This broad power acts on top of other already-broad powers, such as the commerce power, making congressional power virtually unlimited.<sup>106</sup> Similarly, Congress possesses plenary power to spend money under the Property Clause,<sup>107</sup> without tying its expenditures even to the nominally-limited enumerated powers in Article I, Section 8.<sup>108</sup>

Professor Randy Barnett disagrees with Professor Paulsen regarding the proper scope of the Necessary and Proper Clause.<sup>109</sup> The Court never actually expanded the meaning of "commerce" under the Commerce Clause; rather, it was the New Deal Court's willingness to expand the meaning of the Neces-

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100. 514 U.S. 549 (1995).

101. U.S. CONST. art. I, § 8, cl. 1.

102. U.S. CONST. art. I, § 8, cl. 18.

103. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 58–59 (2005) (Thomas, J., dissenting); *Lopez*, 514 U.S. at 584–93 (Thomas, J., concurring).

104. Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008).

105. *Id.* at 992–94.

106. *Id.* at 992–93.

107. U.S. CONST. art. IV, § 3, cl. 2.

108. Paulsen, *supra* note 104, at 998–99.

109. Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005 (2008).

sary and Proper Clause that made federal power so comprehensive.<sup>110</sup> Professor Barnett criticizes this “Rooseveltian” view of the Necessary and Proper Clause, which defers almost entirely to congressional determinations of necessity.<sup>111</sup> Instead, he supports the “Madisonian” view, in which the courts are empowered to enforce textual limits on federal power and must not permit Congress to augment its own powers.<sup>112</sup>

The debate between Professors Paulsen and Barnett on this panel is one of the finest debates the Federalist Society has ever sponsored. I do not, however, find myself in complete agreement with either of them. I will focus, as they do, on the Necessary and Proper Clause, and the Property Clause that Paulsen argues confers the spending power, because I agree with them that all the famous New Deal-era Supreme Court cases that are thought to be broad readings of the Commerce Clause in fact rest on the Necessary and Proper Clause.<sup>113</sup>

I agree with Professor Paulsen that the Necessary and Proper Clause does give Congress the implied power to regulate wholly intrastate activities that substantially affect interstate commerce. I think the New Deal decisions in *United States v. Darby*<sup>114</sup> and in *NLRB v. Jones & Laughlin Steel Corp.*<sup>115</sup> are rightly decided. I disagree with Professor Paulsen, however, to the extent that he implies that *Wickard v. Filburn*<sup>116</sup> and *Raich v. Gonzales*<sup>117</sup> are correct.<sup>118</sup> Like Chief Justice Rehnquist and Justices O’Connor and Thomas, I do not think that regulating the growth of small home-grown amounts of wheat or marijuana for personal consumption is a “necessary and proper” means to achieve the end of regulating interstate commerce.<sup>119</sup> Congress could wholly forbid the intrastate sale of wheat or marijuana (a commercial

110. *Id.* at 1006–07.

111. *Id.* at 1013–15.

112. *Id.* at 1012–15.

113. My understanding of the Necessary and Proper Clause here is shaped by the scholarship of Professor Gary Lawson and Patricia Granger. See, e.g., Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

114. 312 U.S. 100 (1941).

115. 331 U.S. 416 (1947).

116. 317 U.S. 111 (1942).

117. 545 U.S. 1 (2005).

118. See Paulsen, *supra* note 104, at 997.

119. See *Raich*, 545 U.S. at 42–43 (O’Connor, J., dissenting).

activity) or ban its shipment across state lines (pure interstate commerce). But growing crops at home for one's own consumption is an activity that so thoroughly lacks a nexus to interstate commerce that I do not think Congress has the power to regulate it. This is not to say that Congress cannot, under the Necessary and Proper Clause, regulate the possession of some items. Doubtless Congress could outlaw private possession of a homemade nuclear bomb or some lethal virus on the ground that doing so was "necessary and proper" to carrying out the other enumerated powers.

It might seem that I favor judicial activism because I would let Supreme Court Justices substitute their own notions of what laws are "necessary and proper" for those of Congress. The correct approach, however, is to recognize that the Constitution does not leave the meaning of the words "necessary and proper" either to Congress alone or to a five-Justice majority of the Supreme Court applying the Justices' personal, idiosyncratic ideas of what is "necessary and proper." The meaning of these words and their application to present-day problems depends, in the end, on what the American people think they mean acting over a long period of time through our three-branch process of constitutional interpretation. A federal law barring guns in schools, in a world where more than forty states already bar them,<sup>120</sup> hardly seems to be "necessary," much less "proper." The same point might be made more generally to attack the federalization of the criminal law. Why would it be "necessary" and "proper" for Congress to outlaw a lot of things that are already outlawed by almost all of the states? It might be "necessary and proper" to have a federal ban on possession of a nuclear weapon or on criminal civil rights violations, but a federal ban on bringing a gun into a school zone when virtually every state already outlaws it? That is quite a stretch.

A federal law barring the growth for personal consumption of a standard and safe farm commodity like wheat<sup>121</sup> veers so far in the direction of recognizing a new unenumerated power to regulate agriculture that it is unlikely most of the American people would have thought such a law to be "necessary and

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120. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

121. See *Wickard*, 317 U.S. 111.

proper." The same is true of a law forbidding possession of home-grown marijuana for medical purposes.<sup>122</sup> The large number of states and huge majorities of people in national public opinion polls who think that the medicinal use of marijuana is unthreatening prove this fact.<sup>123</sup> The three dissenting Justices in the *Raich* case thus were not simply substituting their own personal and idiosyncratic views of what was "necessary and proper" for Congress's views. They were applying instead the widely-held social understanding of the American people.

To borrow a rule from Article V's amendment procedure, the understanding of the American people of what is "necessary and proper" should be determined by the consensus of three-fourths of the states. In the 1790s, laws like those the Court upheld in *Darby* or *Jones & Laughlin Steel* would not have been deemed to be "necessary and proper," but no one doubts that three-fourths of the states would deem such laws permissible today. It is far less clear that three-fourths of the states believe it is "necessary and proper" to have federal laws against guns in schools.

As Professor Paulsen argues,<sup>124</sup> the Court ought to show a lot of deference to Congress before it strikes down a law on the ground that it exceeds the scope of the power granted by the Necessary and Proper Clause. It may even be that the Court should strike down only one egregious such law every ten or twenty years, doing just enough to prompt Congress to do a better job of policing itself. But when Congress uses the Necessary and Proper Clause to federalize criminal law or to regulate what one grows on one's own land when numerous states would allow cultivation of that commodity, Congress has gone too far. At that point, it is appropriate for the Supreme Court to intervene so that Congress does not become the sole judge of the scope of its own powers.<sup>125</sup>

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122. See *Raich*, 545 U.S. 1.

123. See MARK EDDY, CONG. RESEARCH SERV., MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 16 (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8244:1>.

124. Paulsen, *supra* note 104, at 995-97.

125. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (further detailing the Author's views on federalism).

The other congressional power addressed by this panel is the spending power. Here I must disagree with Professor Paulsen that the spending power flows out of the Property Clause in Article IV, which gives Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>126</sup> Professor Paulsen argues this is a plenary grant of power,<sup>127</sup> but to read it as the source of the spending power seems a stretch. The more plausible source of the spending power is the Necessary and Proper Clause. Structurally, one would expect to find the spending power in Article I, Section 8 along with the taxing power. The spending power is one of the major powers of Congress, so it would be odd for the Framers to describe it not in Article I, which is about Congress, but in Article IV, which is largely about the federal government and the states.

Confirmation of this construction comes from the Clause in Article I, Section 9 that provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>128</sup> In general, Article I, Section 9 limits powers granted to Congress by Article I, Section 8. The Appropriations Clause's appearance in Article I, Section 9 thus strongly suggests that the Spending Power already has been conferred by Article I, Section 8, rather than anticipating the Property Clause of Article IV.

The Property Clause theoretically could be read as the source of the Spending Power as Professor Paulsen argues, but this view is a stretch. It is far more likely that the property of which the Property Clause gives Congress plenary power to dispose is either real property or the equivalent of tangible personal property, not all taxpayer money. This suggests that the test for whether spending is permissible under the Constitution is one that calls for determining whether the spending in question is "necessary and proper" for executing any or all of the enumerated powers of the federal government. This may well lead to a doctrinal test very much like the one the Court adopted in *South Dakota v. Dole*.<sup>129</sup>

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126. U.S. CONST. art. IV, § 3, cl. 2.

127. Paulsen, *supra* note 104, at 999–1000.

128. U.S. CONST. art. I, § 9, cl. 7.

129. 483 U.S. 203 (1987).

In short, Ronald Reagan was right when he urged us all to “[h]old on to” the amended Constitution of 1787 because it is a miracle the likes of which has not been seen in 6,000 years of world history.<sup>130</sup> The United States is the freest nation on Earth and the arsenal of democracy because we have a better Constitution than does Britain, or France, or Germany, or Canada. Restoring the force of the original Constitution will lead to good consequences, not bad ones.

The symposium essays that follow represent the best of the current debate on how, and whether, to achieve that goal.

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130. President Ronald Reagan, Remarks at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in ORIGINALISM, *supra* note 1 at 95, 97.



*Federalist Society Symposium on Originalism*

**I.**

**ORIGINALISM AND PRAGMATISM**

*ESSAYISTS*

FRANK H. EASTERBROOK

LARRY KRAMER

JOHN O. MCGINNIS

MICHAEL B. RAPPAPORT

JEFFREY ROSEN



## PRAGMATISM'S ROLE IN INTERPRETATION

FRANK H. EASTERBROOK\*

Although the title of this panel is in the conjunctive—Originalism *and* Pragmatism—people usually assume that we must choose originalism *or* pragmatism. Pragmatists, such as Justice Breyer and Judge Posner, think it both wise and appropriate to change constitutional norms to serve modern needs.<sup>1</sup> Pragmatists differ from Justice Douglas and other inventionists by giving the political branches what they view as healthy sway, through a Dworkin-like process that treats judges as authors of chain novels.<sup>2</sup> The pragmatist is constrained by what earlier authors have done—but like the inventionists the modern pragmatists insist that in the end how much sway to allow is a question for judges, because judges write today's chapter. Originalists, such as Justice Thomas, deny that the Constitution has changed since its words were adopted; political society evolves informally and incrementally, but legal texts are fixed unless the rules for change (such as statutory or constitutional amendments) have been followed.

I want to defend the assumption of the panel's title—that both originalism *and* pragmatism play vital roles in constitutional practice.

The case for pragmatism is easy to state. Our Constitution is old, and modern society faces questions that did not occur to those who lived during the Civil War and penned the reconstruction amendments, let alone those who survived the Revolu-

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1. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

2. See RONALD DWORKIN, *LAW'S EMPIRE* 228–38 (1986).

tionary War and wrote the Constitution of 1787. What's more, originalism requires us to understand how the linguistic community that approved the words understood their application. A phrase such as "due process of law" or "commerce among the several states" is so much noise unless linked to the original interpretive community. But language is a social and contextual enterprise; those who live in a different society and use language differently cannot reconstruct the original meaning except by feats of scholarship and cerebration. More often, alas, unsupported and hubristic assertion takes the place of hard work.

New problems pose unanswerable questions to someone who thinks originalism the sole method of interpretation. Denying the obvious gives textualism a bad name. And we have had "new" problems from the start: think for example of the Bank of the United States. When James Madison first considered the Bank's constitutional status (while he was in the House) he thought it beyond the new national government's powers; on second take Madison (as President) signed the bill establishing the Second Bank; and then Andrew Jackson vetoed the bill establishing the Third Bank, issuing a veto message that still repays reading. None of what Madison, Jackson, and their contemporaries did or said was encoded in 1787; most problems lack original solutions. So much is inevitable; the Constitution is a very short document.

But no one who had a hand in creating this nation was so foolish as to think that all interesting decisions are encoded in the original text. The decision was to create a federal republic and let the people work out, through their representatives, the problems of time still to come. We do so pragmatically. How else does democracy work?

When the Bank came to the Supreme Court in *McCulloch*, the Justices approved that process. The Bank's opponents pointed to two things: the Constitution creates limited federal powers, and nothing authorizes the national government to create financial intermediaries. To charter a bank Congress needed to rely on the power to enact laws "necessary and proper" to put the other powers into effect. But how could the Bank be "necessary"? The nation could survive without a central bank; between 1810 and 1816 it did (and would again between 1836 and 1913).

By taking "necessary" strictly, the Court could have set itself up as a potent political force, reviewing the wisdom of laws.

The Court resisted. Chief Justice Marshall explained:

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.<sup>3</sup>

There is that famous phrase: "we must never forget, that it is a constitution we are expounding." But now you see its context: as a description of legislative latitude. Marshall was explaining why the political branches have power to act pragmatically, while judges do not! He had *two* theories of constitutional authority—one for Congress, which wields explicit grants of power, and the other for judges. It should hardly be necessary to remind you that there is a real Necessary and Proper Clause, but no judicial review clause.

Congress and the President derive authority from election, and they act under open-ended grants designed for an indefinite future. If a court is to do anything other than bless the

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3. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819).

product of the political branches, it must appeal to concrete decisions. Remember the rationale of *Marbury v. Madison*:<sup>4</sup> the Constitution is a set of laws, superior to statutes; having deciphered the meaning of both judges need only apply standard choice-of-law principles. *Marbury* depicts the Constitution as a catalog of rules, with a meaning comprehensible to all who take the trouble to read carefully. When judges can reach such a firm conclusion, they may insist that the political outcome yield. That is the originalist constraint. Otherwise judges must respect politically pragmatic decisions.

Thus originalism is the tool of the judicial branch—not because it is the only right way to understand texts, not because it is easy, and certainly not because those who apply it will always be right, but because it is the *only* approach that explains why judges have the final word. When an issue lacks an original answer, the premise of judicial review is defeated. When originalism fails, so does judicial power to have the final say. And democracy remains.

Let us not lose sleep over a claim that this leaves a “wooden” Constitution or rule by a dead hand. Originalism is an approach to the allocation of power over time and among the living. Decisions of yesterday’s legislatures (and the 109th Congress is as “dead” for this purpose as the 50th or the 10th) are enforced not only because our political system does not treat texts as radioactive (there is no legal half-life) but also because affirming the force of old texts is essential if sitting legislatures are to enjoy the power to make new ones. Our rules for making law were encoded in 1787 and are no more or less dead than other aspects of the process.

To say that “the dead” govern through originalism is word play. We the living enforce laws (and the Constitution that provides the framework for their enactment and enforcement) that were adopted yesterday because it is wise for us to do so today. Old texts prevail not because their authors want, but because the living want. This isn’t a theory of *interpretation* but of political legitimacy. Originalists accept the Constitution’s

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4. 5 U.S. (1 Cranch) 137 (1803).

theory of political obligation, but it is important to separate the theory of political justification from the theory of interpretation appropriate to that theory of justification.<sup>5</sup>

The fundamental theory of political legitimacy in the United States is contractarian, which implies originalist interpretation by the judicial branch. Otherwise a pack of tenured lawyers is changing the deal, reneging on behalf of a society that did not appoint them for that purpose. This is not a controversial proposition. It is sound historically: the Constitution was designed and approved like a contract. It is sound dispositionally: it is the political theory the man in the street supplies when he appeals to the Constitution (or to the legitimacy of the electoral process, even though his candidate lost).

Contractual rights are inherited. If I buy a house with borrowed money, the *net* value of the house is what my heirs inherit; they can't get the house free from the debt. This is so whether my heirs consent to the deal or not; contract rights pass to the next generation as written.

Both private and social contracts are hard to change, but only someone distracted by babble about "contracts of adhesion" would think this an objection rather than a benefit. We the living accept the power of contract *because* they are hard to change. Stability in a political system is exceptionally valuable. Someone who loses a legislative battle today accepts that loss in exchange for surety that next year's victory on some other subject will be accepted by other losers in their turn. People accept old contracts and old legal texts because they know that this is the only way to ensure that promises *to them* are kept; if all is up for grabs, they are apt to lose both coming and going.

The constitutional contract is no more hypothetical than the losers' willingness to accept the election results today, in the belief that they may win tomorrow. Today's majority accepts limits on its own power in exchange for greater surety that its own rights will be respected when, sometime in the future,

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5. I flesh out this line of argument in *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004); *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); *The State of Madison's Vision of the State*, 107 HARV. L. REV. 1328 (1994); and *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

power has shifted. An originalist system of interpretation facilitates and guarantees this allocation of power over time, and across groups.

Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract. In exchange for receiving power and long tenure I agreed to limit the extent of my discretion. Sneering at the oath is common in the academy, but it was an important part of Chief Justice Marshall's account of judicial review in *Marbury* and matters greatly to conscientious public officials. It should matter to everyone. Would *you* surrender power to someone who can be neither removed from office nor disciplined, unless that power was constrained? The constraint is the promise to abide by the rules in place—yesterday's rules, to be sure, but rules.

Originalism is the constraint for judges, as short tenure is the main constraint for political officials. These different constraints imply different modes of interpretation—just as judges under *Chevron*<sup>6</sup> give politically accountable agencies more interpretive leeway than the judges allow themselves.<sup>7</sup>

My point is simple. Meaning depends on the purpose to which we put it. Judges seek the core of meaning within which further debate is ruled out. That core will be smaller than the scope of all constitutional interests and proprieties. In the end, the power to countermand the decisions of other governmental actors and punish those who disagree depends on a theory of meaning that supposes the possibility of right answers.

You can't view rules of interpretation as unitary. You must search for a norm simultaneously suited to the Constitution and to the actor's role—and judges fill roles different from political actors. We must demand not that the courts' interpretive norm conform to the reader's political theory, but that it be law.

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6. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

7. I expand on this in *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).

## TWO (MORE) PROBLEMS WITH ORIGINALISM

LARRY KRAMER\*

In this Essay, I wish to offer two simple points. The first is that originalist arguments misconstrue history, and the second is that there is no such thing as pragmatic originalism—to the contrary, originalism is by definition unpragmatic and at odds with legal pragmatism.

To understand why being an originalist works only if one ignores or misstates history, we must look briefly at the history of originalism. Some notion of originalism, understood as the theory that the Framers' or Founders' thoughts regarding the Constitution are relevant to constitutional interpretation, has been part of the legal landscape for a very long time, appearing as early as the 1790s.<sup>1</sup> But originalist constitutional interpretation as a discipline—that is, as a distinct subject with a distinct methodology—actually came into being only in the late nineteenth century.<sup>2</sup> Legal treatises and other works on the Constitution written before that time did not contain originalist theories of interpretation. The treatises discuss particular interpretations and offer descriptions of the proper or best understanding of particular clauses, but it took some time before people began to think about the problem of interpretation more broadly and sys-

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1. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1197–208 (1986) (noting that early debates in Congress included reference to Philadelphia Convention participants' recollection of the drafting as an aid to interpretation and arguing that Washington, Madison, and others emphasized originalist approaches); Jack N. Rakove, *The Original Intention of Original Understanding,* 13 CONST. COMMENT. 159, 171–73 (1996) (finding that "the germ of an interpretive theory of original understanding" was present in a speech by James Madison in 1791).

2. See Clinton, *supra* note 1, at 1213 ("The fact that historical originalism was not perceived as the exclusive, or even the predominant, interpretive strategy during the late eighteenth and early nineteenth centuries is not surprising in light of the general unavailability at the time of primary historical materials necessary to undertake originalist research.").

tematically. For most of the nineteenth and early twentieth centuries, even as the problem of interpretation emerged, the main controversy concerned how much deference courts should give to legislatures.<sup>3</sup> The debate was about *who* should interpret, not *how* to interpret. When it came to the question of how to interpret the Constitution, there was general agreement on a kind of conventional approach that mixed different arguments without much systemization—something very much like the mix of arguments lawyers use when interpreting statutes or common law.<sup>4</sup> The Framers' intent was one of these arguments, used alongside text, precedent, and policy, but not superior to them.<sup>5</sup>

The idea of originalism as an exclusive theory, as *the* criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s.<sup>6</sup> The theory first appeared as "original intent originalism," and it looked to what the fifty-five men who drafted the Constitution in Philadelphia intended when they framed the Constitution.<sup>7</sup> That originalism first emerged in this guise is hardly surprising, given that the most readily available evidence about the origins of the Constitution's provisions consisted of notes from the Constitutional Convention collected in a neat four-volume set by Max Farrand.<sup>8</sup> Consequently, a great deal of early originalist work asked what the Framers thought

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3. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 945–46 (1985) (noting debate in the 1830s regarding whether the Supreme Court or the States held the final authority to interpret the Constitution).

4. See *id.* at 948 ("Of the numerous hermeneutical options that were available in the framers' day . . . none corresponds to the modern notion of intentionalism. Early interpreters usually applied standard techniques of statutory construction to the Constitution."); see also Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 111 (1988) (citing examples of the Supreme Court, Alexander Hamilton, and Thomas Jefferson drawing on treatises, context, and common-law rules for guidance in constitutional interpretation, rather than on subjective intent).

5. See Clinton, *supra* note 1, at 1208 (arguing that sources indicate that originalism "never was considered an exclusive interpretive methodology" in the late eighteenth and early nineteenth centuries).

6. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006) (noting "the introduction of original framers' intent originalism in the 1980s").

7. See *id.* at 5–6.

8. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911); see also Clinton, *supra* note 1, at 1213 (noting the unavailability of primary historical materials necessary for originalist research during the late eighteenth and early nineteenth centuries); Powell, *supra* note 3, at 945 (noting increased interest in the Founding Era as original materials were made available).

they were doing when they wrote this or that clause of the Constitution.

Of course, relying on such evidence was immediately subjected to a strong critique that I think everybody is probably familiar with. The sparseness of the evidence was said to leave every question indeterminate.<sup>9</sup> Some people found this sort of argument persuasive, others did not. But a more powerful critique of original intent soon emerged, this one arguing that relying on Framers' intent could not be justified as a normative matter.<sup>10</sup> The intent of the drafters in Philadelphia does not matter, this critique argued, because the Constitutional Convention had no lawmaking authority. The underlying premise of originalism is one of positive law: the Constitution is a species of legislation, authoritative only because and insofar as it was enacted by an authoritative lawmaker. As such, the authoritative intent is that of the people who had the power to make it law, not of the people who drafted the Constitution in Philadelphia.<sup>11</sup> Looking to their intent is like giving authority to a speech writer for the President. It is like giving authoritative weight to the intent of the lobbyists who drafted a bill for Congress, as opposed to the Congress that actually adopted it.

This was a pretty devastating critique, and it required a response. So originalism changed and reemerged in a second form, which we can call "original understanding originalism." Unsurprisingly, given the critique, originalism in its new guise evolved to focus mainly on the views of the ratifiers.<sup>12</sup> It was, perhaps, more than serendipity that this second form of originalism emerged just as extensive material on ratification became easily available to legal scholars through the publication of the multi-volume *Documentary History of the Ratification of the Constitution*.<sup>13</sup> Suddenly everybody could be an historian of ratifi-

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9. See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1996).

10. See, e.g., Lofgren, *supra* note 4, at 84–85. Douglas G. Smith, *Does the Constitution Embody a "Presumption of Liberty"?*, 2005 U. ILL. L. REV. 319, 325 (2005) (book review).

11. See, e.g., Lofgren, *supra* note 4, at 84–85.

12. See Barnett, *supra* note 6, at 5–6.

13. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1978).

cation, because a vast reserve of primary sources were available in neatly bound volumes.

This development made sense as a response to the critique of original intent originalism. But originalism in this second guise soon ran into a set of critiques similar to those that its first form encountered. The indeterminacy argument became stronger, because indeterminacy of intent was magnified by the expansion of the number of individuals whose intent was to be considered.<sup>14</sup> It was not now a small group of fifty-five in Philadelphia whose intent was to be considered, but rather a vast body including every individual who voted on the Constitution. Originalists found themselves trying to recover the understanding of an exceedingly large group of people, a task made even more difficult because different issues were discussed from state to state. There were issues discussed in Pennsylvania that just did not come up in Virginia and vice versa.

As with original intent originalism, there was a second critique that proved fatal to original understanding originalism, and, surprisingly, this critique came from the Right. It built on Justice Scalia's criticism of reliance on legislative history when performing statutory interpretation.<sup>15</sup> Many of the same arguments made in the statutory context applied equally to the Constitution, and so originalism evolved, again, into "public meaning originalism," the form that is most prevalent today.<sup>16</sup>

The easiest way to understand public meaning originalism is to play out the analogy to statutory interpretation. How do we understand the meaning of a statute if we are not using legislative history? We look to the language of the statute and ask about the public meaning of the words, which is to say, how those words are or ought to be understood by the relevant audience. We may, of course, disagree about what that public meaning is, and we may have to litigate the issue. There are arguments made about the proper way to interpret the public meaning of a statute: when to use ordinary parlance, when to

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14. See Brest, *supra* note 9, at 214–15.

15. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005–06 (1992) (summarizing Justice Scalia's approach to statutory interpretation, which generally does not include reference to legislative history).

16. See Barnett, *supra* note 6, at 5–6; Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1502 n.66 (2007).

use the dictionary, when to treat something as a term of art, and when to deploy a canon of construction. There are similar arguments that can be used to recover the public meaning of the Constitution, and the “public meaning” originalist argument is that the proper way to understand the Constitution is according to its original public meaning. This means interpreting the text using the kinds of arguments that would have been used in the late eighteenth century, at the time the Constitution was enacted and became law.

Public meaning originalism is the prevalent version of originalism today, which makes sense given the way it responds to the critiques of both original understanding originalism and original intent originalism. Yet public meaning originalism has some pretty serious defects of its own—the main one being that there was no agreed-upon public meaning of the constitutional terms most often in dispute. This was something the Founding generation learned to its dismay early in the 1790s, when strong disagreements arose regarding the meaning of many of the provisions we are still debating today.<sup>17</sup> Interpretation, the Framers came to understand, was then, as it is today, a process of filling gaps, resolving ambiguities, and settling conflicts. And insofar as there were, at the time, two or more plausible positions on the correct original public meaning of a provision of the Constitution, all one does in embracing one of them today is to take sides in a historical dispute that was not resolved at the time of the Founding, and so is not resolvable on originalist terms today. Originalism claims to be grounded on a theory of positive law, but it actually has no more objective grounding or authority than what Ronald Dworkin does when he applies moral theory to interpret the same provisions.<sup>18</sup>

If, at the time of the Founding, there had been an agreed upon set of conventions for interpretation, then originalists could claim to be applying the same principles of interpretation while disagreeing about their application. That happens all the time, and the test for whether there is a discernible public meaning does not and cannot require that there be unanimity

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17. For discussions of some of these disagreements, see Clinton, *supra* note 1, and Powell, *supra* note 3.

18. See, e.g., RONALD DWORIN, TAKING RIGHTS SERIOUSLY 149 (1977) (arguing for a “fusion of constitutional law and moral theory”).

as to its precise content. The problem is that there was *not* an agreed upon set of conventions for interpreting the Constitution at the time of the Founding, as evidenced by the extensive debates that erupted. On the contrary, the very concept of something we could call constitutional law was new. Such questions as whether constitutional law was like ordinary law and whether the same principles of interpretation used for statutes should apply to the Constitution were up for grabs, and it took two to three decades for the Founding generation to develop principles that applied to these matters. Even then, different and competing principles developed, and there was no more agreement about what the “correct” way to interpret the Constitution was or should be in the early years of the Republic than there is today.<sup>19</sup>

That being so, it is impossible to talk about the notion of an original public meaning, because at that point you really are just making it up from the top down. You are deciding what principles should have been used in the eighteenth century to determine public meaning, because those principles were never settled. You then use those principles, from which you can generate a variety of plausible interpretations, to pick one that you think makes sense. Whatever that accomplishes, it is *not* ascertaining what would have been the original public meaning of the constitutional text at the time that text was adopted.

So, how have originalists handled this problem? They have ignored it.<sup>20</sup> You see this in the originalist scholarship being done today, none of which looks remotely like the way those issues were or would have been debated at the time.<sup>21</sup> As I explained, there was no agreement in the late eighteenth century on how to do constitutional interpretation. There were, rather,

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19. See, e.g., Powell, *supra* note 3, at 912–21 (recounting some of the early debates regarding constitutional interpretation, and noting that “there were sharp disagreements over which interpretive approach was acceptable”).

20. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 520–21 (2003) (noting the lack of effort by originalists to identify the Founders’ interpretive conventions); William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 500 (2007) (“While constitutional textualists embrace . . . close-reading textualism, no one has explained why the conventions they employ capture the way the text was originally read.”).

21. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

different modes of interpretation just beginning to emerge, with no general consensus or agreement on which was right.<sup>22</sup> But whatever the debate was two hundred years ago, it did not look anything like the scholarship we get today from people who tell us they have deciphered the authentic eighteenth-century public meaning of this or that clause of the Constitution.<sup>23</sup>

Any interpretation of original public meaning is a wholly fictitious construct—a construct made possible only because the person presenting it has not learned much about how the Founding generation actually thought matters should be handled. What one invariably discovers about the Founding era is that there was no original understanding or settled means of fixing meaning. There was, rather, indeterminacy at the deepest level, at the level necessary in order even to begin the originalist project.

My second main point is that originalism is by its very nature unpragmatic. To understand why, forget about the Constitution for a minute and think about ordinary legal interpretation. Suppose that yesterday a statute was enacted, and a case involving that statute arose today. There will be questions under the statute that are easy, questions for which everybody would agree about the proper interpretation and outcome. And there will also be questions that are hard, questions for which the proper interpretation is a matter of legitimate disagreement because the text is unclear. Assume this is one of the hard cases. Difficult or not, the court is going to resolve it somehow, employing some set of interpretive principles. For present purposes, I do not particularly care what those principles are. Whatever they are, they produce a resolution.

Hard cases like this are inevitable, because language is unavoidably imprecise. There are always gaps, conflicts, and ambiguities. The court resolves them by whatever techniques, and in so doing closes the gap, resolves the conflict, or eliminates the ambiguity. That solves the immediate problem, but it also

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22. See Powell, *supra* note 3, at 887 (outlining the competing theories of constitutional interpretation at the time of the Founding).

23. See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 150 (2007) (criticizing original public meaning as a theory of interpretation “at odds with the dominant modes of constitutional interpretation in place at the time the Constitution was debated and ratified”).

inevitably creates new conflicts or new gaps or new ambiguities. So a day after that or a week after or a year after, at some later point in time, someone will confront the new problem and another case will arise. The court will at that point do the same thing it did in the first case. It will resolve the problem by whatever interpretive techniques it uses to decide cases. But it will do so not in light of the statute as it was originally enacted. It will do so in light of the statute as it has been modified by the first interpretation, which changed the law in some way by resolving the first problem, and in so doing created the framework that gave rise to the new problem. And this will be an ongoing process: cases are decided, reshaping the law, giving rise to new problems and so new cases, and so on. This is the way we interpret law, the way we understand it ordinarily to work. It is, moreover, a thoroughly pragmatic process because it recognizes the interdependency of legal rules and rulings, the "seamless webness" of the law. What one does in resolving one problem has effects on things around it. So when the next problem arises, it must be resolved in light of what the law has become through implementation and practice.

The same thing is true when it comes to interpreting the Constitution.<sup>24</sup> Indeed, when it comes to the Constitution, one cannot think only in terms of judicial decisions and judicial interpretations, because every time the Court interprets the Constitution, all the other branches of government respond. They change how they think. They change what they do. And the constitutional system develops accordingly. When it comes to the Constitution, in other words, even more than with a statute, what you have over time is courts giving the Constitution meaning, the other branches adapting, courts responding to what the other branches have done, and so on.<sup>25</sup> The interdependency argument is the same as with a statute, except it is

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24. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252 n.252 (1987) (arguing that because the Constitution's meaning exists only in the context of an interpretive practice, that meaning changes when the practice authorizes revised interpretations or when the interpretive norms of the practice change).

25. See Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109-10 (2006) (describing the dialogue between courts and the other branches of government in constitutional interpretation).

more complex and elaborate because there are more moving pieces. To see the powerfully pragmatic premises here, consider the process by analogy to a classic philosophical metaphor. You are in a boat in the middle of the ocean. Whatever problems you may confront in the design or structure of your boat, the one thing you cannot do is rebuild the boat from scratch, because then you are going to drown. You must deal with the boat as it is and take whatever problems present themselves, while doing your best to stay afloat. Think of the Constitution as, in effect, a blueprint for a boat. The Founding generation built and launched the boat, and we have now been out there sailing for a couple of centuries. The whole time we have been confronting and resolving problems, with each resolution changing the structure of the boat—sometimes in small ways, sometimes in large ways.

That being so, does it make sense, when you come upon a new problem, to fix it by going back to the original blueprint, to say “I am going to ignore everything that happened between then and now and resolve this in whatever way is most consistent with the original blueprint?” Well, maybe, except if the engine started in the bow and now it has been moved to the stern, and some new thing appeared only because the engine room was moved, you may be making a huge mistake to get rid of it because it was not in the original design.

This is the sense in which originalism is deeply unpragmatic. Because if you take originalism seriously, it says that wherever we are at any given time, we are supposed to resolve problems according to the original design, ignoring what has happened since then and forcing the problem in front of us back into the original framework, whatever the consequences.<sup>26</sup> Whether this is a good thing or a bad thing, it most certainly is *not* a pragmatic thing. Nor is it a sensible thing.

It does not follow that originalism is irrelevant. To solve a given problem, one would be wise to start with the original design. One cannot understand the boat as it is now without understanding the original design and how and why it evolved to look as it does today. In other words, original understanding is

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26. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (acknowledging that at times originalism, in its “undiluted form,” may be “medicine . . . too strong to swallow”).

a sensible starting point in constitutional interpretation. One will not find answers to a large number of questions, not complete answers at least. Instead, one will find partial answers that led to problems for the Founding generation, which resolved them, creating new problems, which were then resolved by the next generation, and so on. We have been, as a nation, engaged in the process of creating and giving shape to our Constitution from the original blueprint for more than two hundred years. Constitutional law is a form of customary law, albeit customary law refracted through a text. Every generation has faced its problems and resolved them according to its best understanding of the text, handing a refashioned constitutional law on to the next generation to do the same. And that being so, when called upon to interpret the Constitution, we may want to think about original intent as a place to start, but not a place to finish.

# A PRAGMATIC DEFENSE OF ORIGINALISM

JOHN O. MCGINNIS\* AND MICHAEL B. RAPPAPORT\*\*

Originalism and pragmatism are uneasy companions. This Essay will attempt to make them friends. The usual view is that pragmatic interpretation has the essential virtue of ensuring that the consequences of legal decisions will be good.<sup>1</sup> Originalism, in contrast, is thought to focus on fidelity to the past and therefore to permit the Court to reach undesirable, outdated results.<sup>2</sup> This Essay argues that originalism, although it does require judges to focus on the past, actually produces desirable rules today and, further, that originalism is the genuinely pragmatic way to interpret the Constitution.

Originalists largely have failed to meet pragmatic objections. The argument that judges should be originalists simply because that is what the Framers intended is not only circular, but fails to offer any assurance that good consequences attend originalism. The argument that originalism advances democracy seems weak and undeveloped, because originalism sometimes requires judges to strike down a result of the democratic process when statutes or executive actions conflict with the original meaning of the Constitution.<sup>3</sup> Finally, although the ar-

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1. See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 90 (2005) (stating that pragmatism “asks judges to focus on the practical consequences of their decisions”).

2. See, e.g., Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26 (arguing that originalism seems to be characterized by its “inattention” to “future consequences”).

3. For an argument asserting that originalism advances democracy, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–53 (1990) (“In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”).

gument that originalism offers clearer rules to constrain judges than other interpretive approaches contains some truth, that alone is not enough to sustain the case for originalism.<sup>4</sup> The benefits of judicial constraint are limited if judicial decisions, despite their non-discretionary nature, still impose substantial harms. Conversely, if constraint is the overriding objective, non-originalist doctrine may sometimes provide more constrained rules than the original meaning.<sup>5</sup>

Pragmatic interpretation—which is usually thought to involve judges deciding particular cases based on their policy consequences—faces severe problems as an approach to resolving cases. People disagree about whether the consequences of particular decisions are good or bad. If the Constitution is to provide a framework for governance, it cannot simply replicate these disagreements.<sup>6</sup> Or, to put the objection to pragmatic constitutionalism in pragmatic terms, if a constitution is to have an independent settlement function in our polity—one that promotes the important ends of political stability, liberty, and prosperity—it cannot depend on judges deciding the same issues that are endlessly politically disputed. Moreover, judges seem a curious group to interpret the Constitution if consequences are key. As well-respected as its members may be, the Supreme Court is still a small and insulated group of legal ex-

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4. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856, 863–64 (1989).

5. See Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 758 (2007) (stating that an “overriding desire to honor the Constitution’s writtenness, understood as a constraint on interpretation, does not by itself necessitate an exclusive commitment to original-meaning textualism” because “[b]etween original-meaning textualism and utter disregard of a written text, there are a number of intermediate positions that . . . still take seriously the Constitution’s writtenness.”). For an example of the constraint rationale of originalism animating judicial decisions, see *Employment Division v. Smith*, 494 U.S. 872, 872–90 (1990), in which Justice Antonin Scalia, a notable originalist, spends little time investigating the original meaning of the Free Exercise Clause, but emphasizes that the Court’s result will provide a clearer rule than other constructions.

6. See Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999) (describing the framework for governance as requiring the elimination of “coordination problem[s]” and regarding the propriety of decisions and other “attempts by agents to undertake mutually incompatible actions”).

perts who lack the institutional capacity or electoral accountability for evaluating policy consequences.<sup>7</sup>

Originalism can be given a strong pragmatic justification by focusing on the process by which constitutional provisions are created. Provisions created through the strict procedures of constitutional lawmaking are likely to have good consequences. Sustaining these good consequences, however, depends on adhering to the Constitution's meaning when it was ratified. Justified in this manner, originalism allows judges to achieve good consequences through formal legal interpretation without making policy case by case. In a paper of this brevity, we cannot provide exhaustive support for this position, but this Essay will sketch the main elements of a pragmatic defense of originalism. Because such defenses of originalism have been neglected, this Essay strives to encourage a broader debate about the consequences of originalism and other interpretative methodologies.

#### I. SUPERMAJORITY RULES AND DESIRABLE CONSTITUTIONAL PROVISIONS

This Essay's pragmatic argument for originalism can be briefly summarized. First, desirable, entrenched laws should take priority over ordinary legislation because such entrenchments operate to establish a structure of government that preserves democratic decision-making, individual rights, and other beneficial goals. Second, appropriate supermajority rules tend to produce desirable entrenchments. Third, the Constitution and its amendments have been passed primarily under appropriate supermajority rules; therefore, the norms entrenched in the Constitution tend to be desirable. Although there is one significant way in which those supermajority rules were not appropriate—the exclusion of African Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect, addressed below, has rightly been removed.<sup>8</sup>

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7. Scalia, *supra* note 4, at 863 (stating, in reference to the weaknesses of a system of judicial review, that “[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society’”).

8. See *infra* notes 54–63 and accompanying text discussing the exclusion of African Americans and women from a role in selecting drafters and ratifiers of the Constitution.

Finally, this argument for the desirability of the Constitution requires that judges interpret the document based only on its original meaning because the drafters and ratifiers used only that meaning in deciding to adopt constitutional provisions. In short, it is the supermajoritarian genesis of the Constitution that explains both why the Constitution is desirable and why that desirability depends on its original meaning.

The structure of this defense of originalism merits description. It defends the quality of constitutional provisions by reference to the likely consequences flowing from the process that created them. It avoids the Scylla of completely formal defenses of originalism and the Charybdis of completely contestable assertions of what constitutes goodness. The structure is also consistent with perhaps the most common defense of originalism: that it generally ties judges to rules.<sup>9</sup> These rules consist of the interpretative rule of originalism itself as well as the substantive rules in the Constitution.<sup>10</sup> But to the virtue of rule-following, it adds the even more important virtue of following beneficial rules.

The essence of our argument is that the strict supermajoritarian rules that governed the Constitution's enactment make it socially desirable. If the Constitution were simply enacted by majority rule, like statutes, there would be no strong reason to privilege provisions that happen to be in a document called "the Constitution."<sup>11</sup> The supermajority rules of the Constitution's enactment, however, make them good enough to enforce when they conflict with mere majoritarian enactments.<sup>12</sup>

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9. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856 (1995) (arguing that originalism is animated by the belief that "the rule of law requires judges to follow externally imposed rules").

10. To be more exact, statutes are passed not under simple majority rule but under a tricameral process that creates the equivalent of a mild supermajority rule. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 769-74 (2002). But this process is not nearly as stringent as the supermajoritarian process for enacting and amending the Constitution, and is not stringent enough to correct for the serious defects in majoritarian entrenchment.

11. The Constitution does consist mainly, albeit not entirely, of rules rather than standards.

12. See Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 958 (2005) ("Although historical evidence presents no express rationale for the supermajority provisions included in the Constitution, a more apt, albeit general, characterization is that they were intended to promote

Entrenchment of norms offers significant potential benefits.<sup>13</sup> It establishes a framework for government and sets out ground rules that protect against predictable dangers of ordinary democratic governance. Entrenchments, however, last long into the future, and bad entrenchments are at least as harmful as good entrenchments are beneficial. Although majority rule generally is thought to produce desirable, ordinary legislation, permitting a majority to entrench norms would be problematic because majorities have a tendency to pass undesirable entrenchments for a variety of reasons.<sup>14</sup> By contrast, the passage of entrenchments under supermajority rules compensates for these tendencies and produces, on average, good entrenchments. This Essay briefly explains a few of the reasons for the superiority and the desirability of supermajoritarian entrenchment.

First, because entrenched norms cannot easily be eliminated, controversial entrenchments can be extremely divisive. Majorities, even narrow ones, tend to pass such entrenchments if they believe that these norms will make for good entrenchments. Moreover, even if a majority recognizes that entrenchments should have consensus support, it might still be reluctant to refrain from entrenching controversial norms for fear that a future majority will entrench its preferred norms despite the lack of a consensus.<sup>15</sup> If a majority enacts controversial entrenchments, minorities may strongly oppose them and may be furious that bad norms, which cannot be repealed by the ordinary democ-

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good decision making in instances where majority rule would have proved problematic in some respect.”).

13. A good summary of the benefits can be found in Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002). See also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 419–22 (2003).

14. The reasons for the view that majority rule is beneficial are complex, but include both preference and epistemic arguments. See Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 995–96 (2001). One important exception to the presumed beneficence of majority rule occurs if citizens have preferences of different intensity about an issue. In that case, a majority that enjoys modest benefits can get a law enacted, even if the minority suffers much greater costs. Entrenchment actually tempers this problem as well. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1174 (2006).

15. McGinnis & Rappaport, *supra* note 14, at 1180 (“If the current majority refrains from entrenching a norm that has majoritarian but not consensus support, it cannot be confident that a different majority in the future would be similarly restrained.”).

atic process, will govern the nation. The minorities' alienation will lessen their allegiance to the Constitution and the regime.

Supermajority rules, however, address this problem by permitting only the entrenchment of norms with substantial consensus.<sup>16</sup> A broad consensus for the Constitution creates legitimacy, allegiance, and even affection as citizens come to regard the entrenched norms as part of their common bond.<sup>17</sup> Such a Constitution helps individuals transcend their differences, such as ethnicity or geography, and makes them citizens of a single nation.

Second, majorities in a party system tend to be partisan. Because of partisanship, majorities will tend to abuse their power for at least two reasons. First, partisanship may lead majorities to adopt a non-rational "us versus them" attitude that will focus their attention away from the merits of legislation. More rationally, majorities may decide to entrench legislation that they do not really believe should be entrenched, if only to foreclose legislation that they fear the opposing party will entrench when it comes to power.<sup>18</sup> For instance, legislators from one party might decide to entrench low taxes and low debt to prevent the other party from entrenching entitlements, even if both parties believe the nation would be better off without entrenching either program. Supermajority rules can also decrease the ill effects of partisanship by making it less likely that entrenchments can be passed with the support of only one party. If the two parties must cooperate to pass legislation, they

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16. See Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 937-39 (2003) (arguing that consensus is key to democratic legitimacy).

17. Cf. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 394 (1998) (stating that state constitutionalism helps transcend communal identities).

18. It might be argued that parties could avoid the prisoner's dilemma created by majoritarian entrenchment simply by entrenching a prohibition on matters that the other party would entrench when it came to power. One difficulty with this strategy is that a party cannot necessarily predict the full range of measures the other party will want to entrench and thus faces far more uncertainty in determining what entrenchments to prohibit than in determining what entrenchments to make. For instance, one party may seem to be interested in entrenching health care entitlements. Although that entrenchment could be prohibited, when that party comes to power, it might desire to make a different entrenchment. Given the difficulty in blocking the other party's desired entrenchments, the majority party may decide it is more attractive to entrench an item central its own party's ideology.

are less likely to indulge in “us versus them” attitudes.<sup>19</sup> Moreover, supermajority rules will prevent the destructive competition by which one party races to entrench its political program before the other party entrenches its own program.

Third, the long-term nature of entrenchments makes it less likely that legislative majorities will enact desirable entrenchments. Individuals have a heuristic problem in thinking about the future: they are too disposed to believe that current trends will continue.<sup>20</sup> Similarly, majorities may be prone to support constitutional provisions out of the mistaken belief that present circumstances will continue in the future. In addition, citizens cannot easily hold legislators accountable for their entrenchment votes because most legislators will leave office years before the long-term effects of the entrenchments appear.

Although supermajority rules would not address these problems directly, they would improve legislative entrenchment decisions in other ways that would compensate for these deficiencies. For example, supermajority rules restrict the agenda of proposals because fewer proposals have a realistic chance of passing. A restricted agenda encourages a richer stream of information about the proposals, which improves legislative determinations. More significantly, a strict supermajority rule—coupled with the requirement that the constitutional entrenchment can be repealed only by a similarly strict supermajority—also improves the quality of entrenchments by creating a limited veil of ignorance.<sup>21</sup> Because proposals deeply entrenched under

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19. For support for the assertion that supermajoritarianism diminishes partisanship, see Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 LAW & CONTEMP. PROBS. 245, 250 (2000).

20. The roots of this tendency lie in the “representativeness” heuristic. That heuristic tends to make people extrapolate overconfidently about predicted characteristics of a class based upon a small sample size of which they happen to be aware. Amos Tversky & Daniel Kahneman, *Belief in the law of small numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23, 24–25 (Daniel Kahneman et al. eds., 1982). If the sample consists of events rather than objects, the heuristic should tend to make people extrapolate in a similarly irrational manner from events of which they are aware to uncertain future events. For an important present-day application, see ROBERT J. SCHILLER, *IRRATIONAL EXUBERANCE* 143–44 (2000) (using work on the representativeness heuristic to suggest that people will think stock market patterns of today will be like those of tomorrow).

21. On the veil of ignorance, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990).

supermajority rules cannot be repealed easily in the future, citizens and legislators cannot be certain how the provisions will affect them personally. If they are unable to cater to their own, unknown interests, then they are more likely to consult the interests of all future citizens to determine whether they will support a provision. For these reasons, strong supermajority rules are likely to overcome the problems that afflict majoritarian entrenchment and to produce beneficial entrenchments.

## II. THE BENEFITS OF SUPERMAJORITARIAN ENACTMENT OF THE ORIGINAL CONSTITUTION

It is clear that the Constitution and its amendments were mainly a product of the kind of stringent supermajority rules that generate beneficial entrenchments.<sup>22</sup> Constitutional amendments must be approved by two-thirds of each house of Congress and ratified by three-quarters of state legislatures.<sup>23</sup> The original Constitution was also a product of a double supermajoritarian process. Article VII expressly required nine of the thirteen states to ratify the Constitution before it took effect.<sup>24</sup> In addition, a supermajority of states originally had to support the Constitutional Convention.<sup>25</sup>

This kind of consensus-forcing process creates very substantial real world benefits, not only abstract goods. This is particularly true when one considers the effect that the veil of ignorance had in the construction of the Constitution. For example, when considering the extent of the President's power, the Framers had to recognize that sometimes they would support the President's policies and sometimes they would not.

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22. Again, the one glaring defect in those supermajority rules was their exclusion of African Americans and women from the franchise, discussed below. See *infra* notes 54–62 and accompanying text.

23. U.S. CONST. art. V.

24. U.S. CONST. art. VII; see also CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787*, at 225–28 (3d ed. 1986) (discussing the Constitutional Convention and the events that precipitated the decision to require the approval of nine states to ratify the Constitution).

25. See BOWEN, *supra* note 24, at 11–13.

Accordingly, they parceled out his authority based on public interest, rather than partisan considerations.<sup>26</sup>

The supermajoritarian constitution-making process helps to account for the beneficence of the Constitution. Although most Americans believe that the amended Constitution is an exemplary document, most do not seek a reason for believing in its excellence. Rather than view the document as the product of a few great men, this Essay's argument considers it largely the result of the supermajoritarian process that enacted it. That process generated some of the most distinctive and praised features of the Constitution. Because of the need to compromise to obtain consensus at the Convention, the nationalist forces conceded an indestructible role for the states, which led to constitutional federalism.<sup>27</sup> To obtain ratification in the necessary nine states, the nationalists had to promise the enactment of a bill of rights once the new government was established.<sup>28</sup> Thus, the supermajoritarian ratification process was the big bang of our constitutional universe and brought into effect the key elements of a document admired throughout the world.

### III. ORIGINALISM AS THE NECESSARY MEANS FOR PRESERVING THE SUPERMAJORITARIAN BASIS OF THE CONSTITUTION

Finally, beneficial judicial review requires originalism because the original meaning of the Constitution was the crucial factor in obtaining the consensus that makes constitutional provisions desirable. The ratifiers in the supermajority of states approved the provisions based on commonly accepted meanings and the interpretive rules of the time.<sup>29</sup> Some of the provi-

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26. See, e.g., THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing the four-year presidential term and impeachment as checks on the authority of the executive).

27. See Martin Diamond, *What the Framers Meant by Federalism*, in AMERICAN INTERGOVERNMENTAL RELATIONS: FOUNDATIONS, PERSPECTIVES, AND ISSUES 39, 43–44 (Laurence J. O'Toole, Jr., ed., 2d ed. 1993) (seeing American federalism as a compromise between nationalists and true federalists).

28. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 234–35 (1985) (describing the Bill of Rights as a tactical compromise between Federalists and Anti-Federalists).

29. See BORK, *supra* note 3, at 144 (stating that “what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean”).

sions approved had clear meanings. Others may have seemed ambiguous, but the ratifiers believed their future application would be based on familiar interpretative rules. Following the original meaning of their provisions as construed through the Framers' own interpretative rules remains faithful to their expectations of the likely effects of the provisions.<sup>30</sup> In contrast, following a meaning whose substance or derivation was not endorsed at the Framing severs the Constitution's connection with the process responsible for its beneficence.

Additionally, if interpretative rules at the time of the Framing are important, this suggests a need to reorient originalist constitutional scholarship. The first model of originalism focused on original intent.<sup>31</sup> When originalists recognized that focusing on original intent wrongly emphasized the subjective purposes of the Framers, most originalists embraced the original meaning of the text as a better, second model of originalist interpretation.<sup>32</sup> A debate then arose over how to define the original meaning and the best means of ascertaining it.<sup>33</sup> Although some originalists avoid using interpretative rules from the Framers' time, this Essay suggests that these rules are necessary both for the definition of originalism and for originalism to have beneficial consequences.<sup>34</sup> Thus, the third model for originalism will help resolve ambiguities in meaning by deploying the Framers' interpretative rules.<sup>35</sup>

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30. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1494 n.21 (2005).

31. See BORK, *supra* note 3, at 143 (arguing that "the dominant view of constitutional law" used to be that judges ought "to apply the Constitution according to the principles intended by those who ratified the document").

32. For an explanation of the distinction between original intent and original meaning, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38–41 (Amy Gutmann ed., 1997); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001).

33. See, e.g., DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 91 (2005) (describing the debate in terms of "hard" and "soft" originalism).

34. For an example of an originalist who does not believe in following the interpretive conventions of the Framers, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525 n.23 (2003) (citing GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 70 (1992)).

35. For a discussion of the enterprise of using interpretive rules to fix meaning, see *id.* at 525–29.

A comparison of constitutional lawmaking through case-by-case Supreme Court norm creation reveals the problems with the theories that usually support pragmatism. First, constitutional lawmaking through judicial review gives a very small number of Justices the power to generate norms through their decisions, whereas constitutional lawmaking requires the broader participation of many citizens. Second, the Supreme Court is drawn from a very narrow class of society: elite lawyers who then work in Washington.<sup>36</sup> In contrast, constitutional lawmaking includes diverse citizens with a wide variety of attachments and interests. Finally, constitutional lawmaking is supermajoritarian, while the Supreme Court rules by majority vote. In short, these reasons suggest that the doctrines created by Supreme Court Justices are likely to lead to worse consequences than doctrines flowing from the original meaning of the Constitution.<sup>37</sup>

Some scholars argue that the Supreme Court will provide better results by embracing the incremental and case-by-case manner of the common law rather than following the original meaning of the Constitution.<sup>38</sup> This argument, however, fails to recognize that traditional common law crafted by judges differs crucially from constitutional common law. Under traditional common law, the legislature could overrule common law decisions, while constitutional common law allows judges to invalidate the decisions of the legislature. Thus, to justify common law constitutionalism, one would have to show not merely that it is good enough to exist in the absence of statutes, like the ordinary common law, but that it is good enough to override statutes. To our knowledge, no one has made a persuasive case that constitutional common law possesses such an extraordinary quality. Furthermore, the characteristics of Supreme Court judging noted above, including its insularity and lack of consensus, militate against claims of superior quality.

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36. See John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541, 542–43 (1999) (discussing factors that make Supreme Court Justices remote).

37. For similar but distinct arguments for why the Constitution and its amendments should take priority over judicial doctrine, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34–48 (2000).

38. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that “it is the common law approach . . . that best explains, and best justifies, American constitutional law”).

Therefore, not only does the Constitution's original meaning possess a high enough quality to displace ordinary democratic lawmaking, but more free-form methods of judicial interpretation do not provide similar assurance of superiority to democratic lawmaking.<sup>39</sup> Although this Essay defends originalism as a pragmatic interpretive approach, originalism cannot be evaluated in isolation. The salient question—and the question any good pragmatist should recognize as salient—is what other approach is more likely to reach consequences that are as sound as the consequences reached by originalism. Conceding that originalism is not ideal, this Essay asserts that originalism is likely to have better consequences than competing approaches.<sup>40</sup>

#### IV. COUNTERARGUMENTS: ANCIENT ORIGINS AND THE EXCLUSION OF BLACKS AND WOMEN

The cornerstone of this Essay's pragmatic defense of originalism faces two significant challenges. The first is that long-dead, bewigged ancestors created the Constitution, rather than the living; the second is that these ancestors excluded crucial parts of the polity, such as African Americans and women from the creative process.<sup>41</sup> These lines of attack have not been limited to academics but have been pressed more generally in the public

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39. Some might argue that because the supermajoritarian process establishes only a presumption of beneficence, judges should be able to use non-originalist methods of construing a particular provision if they independently determine that the provision is undesirable. The difficulty with this approach is that judges have no adequate process for determining either when the presumption in favor of the original constitutional norm should be overcome or what new norm to use as a replacement. Moreover, judges of various ideologies cannot be expected to reach agreement on any alternative method, or even to apply their own chosen method consistently, because of biases unchecked by others who adhere to a different ideology but work within the same methodology. As a result, the norms selected would tend to be unpredictable and partisan.

40. Some might argue that this pragmatic argument for originalism is as contestable as those made in the usual pragmatic theories of justice. But the argument is based on a procedural theory demonstrating the virtues of supermajoritarian entrenchments. In contrast, arguments about the beneficence of particular decisions generally must rest on substantive theories based on broader notions of the good. This argument asserts that procedural arguments can command greater consensus than substantive ones. In addition, only a single point needs to be defended, whereas case-by-case pragmatism must predict and defend the consequences of an endless series of discrete decisions.

41. See, e.g., Amar, *supra* note 37, at 35.

sphere for many years. Thus, one could argue that these critiques enjoy a sufficient consensus to be taken seriously, and that their public resonance confirms that the key question originalists must answer is whether the process of framing was good enough to be respected now.

#### A. Ancient Origins

The first complaint lodged against originalism has been around at least since the Progressive Era.<sup>42</sup> This argument is based on the proposition that today is for the living and those long buried should no longer rule.<sup>43</sup> An extreme version of this “dead hand” complaint—that a current majority must be able to change the past constitutional rules at will, either directly or through free-form interpretation of their own—is simply inconsistent with constitutionalism. A constitution is designed to restrain current majorities, either to prevent temporary passions from doing damage to the social order or to prevent majorities from trampling on minority rights.<sup>44</sup> Moreover, if the dead hand objection is actually correct, society must question the need to pay attention to the constitutional text, given that the text is as much a product of the past as the meaning a past generation understood it to convey. Finally, even if this critique were sound, it would only justify upholding current democratic decisions when they conflicted with the original meaning. A focus on the dead hand hardly suggests that the Supreme Court—itsself the product of the original constitutional settlement—enjoys the power to displace the decisions of living legislators.

A more plausible concern about relying on a historical document would ask whether a past generation had more power to influence the document than the current generation. If the Framers could insert provisions into the Constitution more easily than living individuals, then the Framers would have an unjustified advantage in establishing fundamental law. No purpose is served by granting an earlier generation more in-

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42. See David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 815 (1998) (discussing this progressive attack).

43. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128–29 (1998).

44. See *id.* at 1130.

fluence on the content of the Constitution than any other generation. Originalist constitutionalism, however, does not suffer from this malady. The original Constitution came into being through stringent supermajority rules, and each generation can amend the Constitution through similar, though not identical, rules. Thus, each generation has essentially equal formal authority to place its political principles into the Constitution.

Although it may be harder, as a practical matter, to amend the Constitution today than it was to frame the original Constitution, that is largely the result of the Constitution's success; people are loath to amend a document under which the United States has become the most prosperous large nation on Earth.<sup>45</sup> The difficulty of amending the Constitution is also the result of the Supreme Court's now frequent disregard of the original meaning. More constitutional amendments would pass if the Court did not revise the Constitution every time a principle becomes popular enough that the public might be willing to place it in the Constitution.

Additionally, judicial anticipation of the amendment process is not harmless. First, the Court is unlikely to establish the same norm that the amendment process would have produced because it is difficult to know what consensus would have emerged from the supermajoritarian process. Second, the Court is unlikely to limit its decisions to the probable political consensus. For example, the consensus likely favors a right of contraception without encompassing the right of abortion, but Justices who strongly favor abortion rights could include the right to abortion within a nebulous right of privacy. Third, the prospect of non-originalist judging makes it harder to obtain a consensus on an amendment, because ratifiers of the amendment understandably are concerned that a subsequent activist court will unwind their constitutional text. The Equal Rights Amendment foundered in part on fears that activist courts

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45. See Stephen L. Carter, *The Constitution, The Uniqueness Puzzle, and The Economic Conditions of Democracy*, 56 GEO. WASH. L. REV. 136, 140 (1987) (describing the Theory of Democratic Prosperity, which asserts that "the success of constitutional government in the United States" is because of "the growth over time of the economy, the generally improving standard of living," and "the continued flourishing of the middle class").

would seize on it to enforce unisex bathrooms and other ideological extravagances.<sup>46</sup>

A variation on this progressive attack might be thought to have more bite than the dead hand objection per se. According to this view, it is all very well to say that the consensus nature of constitutional provisions made them desirable when they were enacted, but argues that those provisions are now archaic and no longer produce the benefits they once did, given that the world has changed. This kind of attack may be implicit in translation theories of the Constitution that purport to take account of social change by applying the Framers' values in the context of the present day.<sup>47</sup>

This objection might have force if the Constitution purported to frame a code of rules of primary conduct, but the Constitution does not.<sup>48</sup> Those who framed the original Constitution and the amendments *never forgot that it was a Constitution they were expounding*.<sup>49</sup> Therefore, they accounted for the fact that the Constitution should contain only a framework for a government that would respond to the enduring realities of human nature and the problems of social governance.<sup>50</sup> In this way, the reality of change was already taken into account in the making of the Constitution.

The best proof of the Framers' perspective lies in the Constitution itself. The Constitution permits substantial avenues to address social change. The States have few restrictions on their powers absent congressional action.<sup>51</sup> Individual experiments to

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46. See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 412 (2000).

47. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) ("[The judicial duty] is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances."); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170–74 (1993).

48. With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all. Nor does it prescribe many substantive regulations for the government. Instead it largely sets out decision-making rules for governmental institutions to regulate both private and governmental conduct.

49. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

50. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 306–09 (1989) (articulating the position that the Framers meant for the vagueness of the Constitution to eventually fix into a settled meaning).

51. The original Constitution contained a quite modest set of restrictions on states. See U.S. CONST. art. I, § 10 (containing certain limits on states, such as pro-

address changes can be readily adopted by other states, given the free flow of information and free movement guaranteed by the Constitution.<sup>52</sup> The Constitution also granted Congress substantial power to legislate under the Commerce Clause and the Necessary and Proper Clause, albeit not the unlimited power modern case law has bestowed.<sup>53</sup>

Finally, the Constitution creates an amendment process to replace outdated provisions. Unsurprisingly, a legal document produced by a high quality process would offer many ways to address social change; its many avenues for democratic change reflect its quality.

In the face of this structure, there is no reason to be confident that a clamor for judges to substitute a new meaning for the original meaning is a response to changing social conditions and not an attempt by special interests, numerical minorities, or transient majorities to change the Constitution to reflect their peculiar values. Furthermore, even if the Supreme Court is sincerely attempting to update the Constitution, the Court as an elite and centralized institution lacks the ability to elicit the consensus that can reliably differentiate responses to social changes from constitutional putsches.

### B. *The Exclusion of Blacks and Women*

The second attack on constitutional lawmaking comes from the 1960s. The key complaint is that, until recently, African Americans and women did not vote on the Constitution and key amendments.<sup>54</sup> This defect in constitutional lawmaking supposedly deprives it of legitimacy, or should at least lower our estimation of the Constitution's quality. The exclusion of

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hibitions on states coining money or entering into compacts with other states). Although the restrictions of the Fourteenth Amendment are more extensive, particularly if one believes that the Fourteenth Amendment incorporates the Bill of Rights, even those provisions, if construed according to their original meaning, do not impose draconian restrictions on the States.

52. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599-1607 (2004) (discussing competitive federalism as an engine for social change).

53. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

54. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

these groups from constitutional lawmaking is a defect. In fact, these exclusions actually go to the theoretical heart of the supermajoritarian argument, which is that supermajority rules are only desirable when they require a reflection of all interests in the electorate. Thus, the absence of African Americans from the Framing and the blatant disregard of their interests may well have meant that the Constitution did not bind them.

From today's perspective, these points are largely moot because these defects in the Constitution have been corrected. The Thirteenth Amendment prohibits slavery, the Fourteenth Amendment forestalls government racial discrimination, and the Fifteenth Amendment prevents denial of the franchise based on race.<sup>55</sup> Moreover, the Voting Rights Act has implemented these constitutional provisions to guarantee that African Americans can fully participate in elections.<sup>56</sup>

That the Constitution now grants all people the freedoms once only guaranteed to white, male property owners suggests the elimination of the defects of the original Constitution. The Constitution does not contain items like a mandate for racial preferences, but given the disagreement about such policies even today, it is implausible to believe that the Constitution would have included them, even if all groups were represented. Thus, these defects of the original process do not provide reasons for ignoring the original meaning as amended.

A related criticism of the original Constitution is that its tragic countenancing of slavery was the fatal defect that rendered the document illegitimate.<sup>57</sup> While slavery was certainly tragic, the responsibility cannot be laid at the feet of the Constitution or its supermajoritarian basis. A serious attempt to eliminate slavery would have defeated any constitution and probably fractured the nation.<sup>58</sup> Despite its acquiescence to slavery, the original Constitution contributed to a social order based on markets and freedoms that helped persuade Americans that

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55. U.S. CONST. amends. XIII, XIV, & XV.

56. 42 U.S.C. § 1973 (2000).

57. See, e.g., Marshall, *supra* note 54, at 3–5 (discussing how treatment of African Americans constituted an “inherent defect” of the original Constitution).

58. See Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 415 (2001) (stating that the Framers could not have abolished slavery and passed the Constitution).

slavery is wrong.<sup>59</sup> It seems unlikely that African Americans would have been better off with a failure of the Constitution in 1789 and a retreat to sectional governments.

A similar complaint can be made about the absence of rights for women in the original Constitution. This complaint is less powerful because there is a strong counterargument that women were virtually represented at that time by their male relatives and that many women apparently believed they should not have the right to participate.<sup>60</sup> The Nineteenth Amendment now grants women the right to vote.<sup>61</sup> Moreover, the Constitution would have likely been amended to prevent government sex discrimination had the Supreme Court not guaranteed such a right through its construction of the Fourteenth Amendment.<sup>62</sup> Thus, the Constitution has now been corrected to provide equal rights to all Americans.<sup>63</sup>

One final objection to this pragmatic defense of originalism is simply to find a constitutional provision widely believed to be defective and suggest that the provision demonstrates that the Constitution is of low quality. An example might be the provision that prevents a foreign-born citizen, like Governor Arnold Schwarzenegger, from becoming President.<sup>64</sup> This Essay argues

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59. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 7–9 (1992) (noting that the original Constitution was written to accommodate abolition and equality).

60. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 982–83 (2002) (discussing the argument that women were virtually represented by the heads of their households); HELEN KENDRICK JOHNSON, *WOMEN AND THE REPUBLIC* 12–13, 316 (1913) (arguing that suffrage is inconsistent with democratic principles and that voting would be detrimental to the institution of the home).

61. U.S. CONST. amend. XIX.

62. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 46 (1986) (suggesting that the Supreme Court's innovations in applying the Fourteenth Amendment as a principle of gender equality undermined the case for ratification of the Equal Rights Amendment).

63. Although this Essay addresses the most obvious defects arising from the exclusion of women and African Americans from the Framing, it might be argued that their absence caused subtler, more wide-ranging problems. Under this view, these groups would have not only sought equality provisions, but also had a different substantive agenda. Yet there is not a strong case that the Constitution would have been systematically different had these excluded groups been included. In the absence of strong evidence that the Constitution would have been transformed by these other voters, the original Constitution's rules should be followed because they still offer the best evidence of good entrenchments.

64. U.S. CONST. art. II, § 1, cl. 5.

only that the Constitution taken *as a whole* is of high enough quality that its original meaning should be enforced. Some provisions may become undesirable and yet remain law because they are not so bad that a supermajority will repeal them. Following any legal rule has costs; therefore, retaining a bad constitutional provision is simply a cost of following a supermajoritarian enactment rule when that rule generates a constitution with benefits that exceed its costs.

### CONCLUSION

Debates about originalism have often resembled skirmishes between two armies that never really confront one another. Originalists talk about the rule of law and democracy, while non-originalists talk about indeterminacy, social change, and the consequences of individual cases. Providing a consequentialist defense of originalism maps out a new field of engagement. This theory recasts the old arguments for originalism by using democracy and the rule of law to defend originalism's consequences. This Essay argues that originalism provides a theory of constitutional interpretation that has good consequences, even though it does not force judges to assess consequences on a case-by-case base.

In doing so, this Essay presents a new, frontal challenge to non-originalists. To meet this challenge, non-originalists must show that their theories generate better consequences and provide some metric for assessing those consequences that does not merely reflect a narrow theory of substantive good. Until this challenge is met, originalists can defend their respect for the original meaning attached to the Constitution with the understanding that this meaning offers the best protection of the living.



# ORIGINALISM AND PRAGMATISM: FALSE FRIENDS

JEFFREY ROSEN\*

The idea that either pragmatism or originalism can restrain judges meaningfully in hard cases is illusory. Professors McGinnis and Rappaport have suggested that pragmatism and originalism should be thought of as friends.<sup>1</sup> The friendship they provide is pallid and unsatisfying, however, because both promise more than they can deliver.

Both pragmatism and originalism are defended by their most prominent champions as ways of promoting democracy and judicial restraint. Judge Easterbrook, one of our most distinguished originalists, gave that defense when he said, "When originalism fails, so does judicial power to have the final say. And democracy remains."<sup>2</sup> Justice Breyer's new book makes a similarly passionate consequentialist defense of pragmatism as a way of promoting both values of democracy and restraint.<sup>3</sup>

After studying the hard cases and analyzing the results of originalism and pragmatism, I am not convinced that either theory consistently follows through on this promise. Therefore, it seems better for those who care about promoting democracy to abandon these abstract, and ultimately unproductive, methodological debates and to embrace openly a tradition of bipartisan judicial restraint.

This is the tradition of Thayer, of Holmes, of Frankfurter, and most recently of the lamented Justice White.<sup>4</sup> The tradition has

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1. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 (2008).

2. Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901, 904 (2008).

3. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5–6 (2005).

4. See Alan A. Stone, Book Review, 95 HARV. L. REV. 346, 360 (1981) (reviewing H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981)); Dennis J. Hutchinson,

no consistent defenders on the current Supreme Court. It would require deference to democratic processes in most situations, striking down very few federal or state laws. Neither originalists nor pragmatists have shown a willingness to embrace such restraint. So when Professors McGinnis and Rappaport challenge us to find a better theory,<sup>5</sup> the theory is clear: defer, defer, defer.

I should confess that I am something of a recovering originalist. I was a student of the wonderful Professor Akhil Amar at Yale and imbued his infectious enthusiasm for the promise that originalism, when applied in a principled way, might lead to genuinely bipartisan results. Learn the history better than the judges, said Amar, and you can be more principled than the originalists themselves.<sup>6</sup> I was caught on fire with the promise of that superb teacher. I took it seriously and devoted years of my early career trying to learn enough about the history of the Fourteenth Amendment to be able to interpret it in a principled way. Imagine then my earnest sense of disappointment and shock when I read the U.S. Reports and found in case after case no trace of the complicated history that Amar had taught me to learn. Instead, there was a deafening silence on all of the issues where one would have most expected it to be found.

In particular, I want to discuss three of these issues: affirmative action, federalism, and religion. There is no Justice on the current Supreme Court who has studied the history of the Fourteenth Amendment with the rigor that one should expect of a principled originalist. Few appellate judges have put in that dark and lonely work either.

There is, however, one judge in particular who has done that work. This is the esteemed Judge Michael McConnell. If I had to pick an Originalist-in-Chief, and if I could turn over the whole enterprise to a single person in the United States, it would be Judge McConnell.<sup>7</sup> He deserves bipartisan recogni-

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*Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409, 1409 (2003).

5. McGinnis & Rappaport, *supra* note 1, at 935.

6. See, e.g., Akhil Reed Amar, *Rethinking Originalism: Original intent for liberals (and for conservatives and moderates, too)*, SLATE, Sept. 21, 2005, <http://www.slate.com/id/2126680/> (discussing the importance of historical context in constitutional interpretation).

7. For a sampling of Judge McConnell's writings on originalism, see Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. &

tion for the scrupulousness and care with which he has studied the history and tried to apply it.

Should we not then be angry, indignant, and appalled that Judge McConnell's history, his insights, and his reminders of the complicated lessons that history teaches are absent from all of the most important cases in the areas I have described?

First, consider affirmative action. A seemingly simple question is whether affirmative action is permissible in public contracting.<sup>8</sup> Is affirmative action in public contracting a violation of the original understanding of the Fourteenth Amendment? Judge McConnell has taught us not to ask whether there is a rule of colorblindness across the board for all state action. Instead, he says that the question is whether a particular public benefit should be considered a privilege or immunity of citizenship. If it is, the government must be colorblind. If not, it is free to discriminate against or in favor of whomever it chooses.<sup>9</sup>

But the question whether the rights of the subcontractor on a highway project are privileges or immunities of citizenship is complicated. One could argue either way.<sup>10</sup> First take the case against this position, because it is easier. Privileges or immunities, says Judge McConnell, are uniform from state to state.<sup>11</sup> They do not vary. They are a matter of entitlement rather than discretionary privilege.

At the time of the Fourteenth Amendment's ratification, building highways was mostly a concern of private businesses.<sup>12</sup> If building highways were not a civil right that the Framers would have thought of as a privilege or immunity, the consequences are jarring. That conclusion means the government is free to distinguish on the basis of race. It is free to discriminate

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PUB. POL'Y 457 (1996); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

8. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

9. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1103-04 (1995).

10. See generally Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998).

11. See McConnell, *supra* note 9, at 1028.

12. The Fourteenth Amendment was ratified in 1868. As of the late 1930s, highway construction was still primarily a private enterprise. See LEE MERTZ, *FED. HIGHWAY ADMIN., ORIGINS OF THE INTERSTATE 3* (2006).

against or in favor of particular people when contracting, an outcome that no current Justice would be willing to embrace.

But the issue can be argued the other way. Imagine that the right to be a subcontractor is a privilege or immunity of citizenship. That position has vastly disruptive consequences. It means that the right to work on federal highway projects, as well as other benefits that the government doles out, would be subject to a colorblindness rule and to a general prohibition on discriminatory classifications. If the right to be a subcontractor has to be given to everyone on equal terms, presumably any discrimination among subcontractors would have to be evaluated under strict scrutiny rather than under rational basis review.

As a result, much of the post-New Deal jurisprudence would no longer be good law. Consider *Williamson v. Lee Optical*, the case that upheld as rational a distinction between opticians and ophthalmologists.<sup>13</sup> The *Williamson* case could not stand. The *Beazer* case, involving the question whether methadone users can be excluded from working on railway cars,<sup>14</sup> similarly could not stand. Essentially, we would be ripping up root and branch the bulk of the post-New Deal jurisprudence.

Such a possibility might gladden the hearts of that small and shadowy movement that a few liberal conspiracy-mongers have called the effort to resurrect "the Constitution in Exile."<sup>15</sup> I know that for many, the movement is really just a conspiracy cooked up by me, Cass Sunstein, and the *New York Times Magazine* photo department.<sup>16</sup> But it would be impossible to claim that this prospect of striking down the New Deal is consistent with judicial restraint. Adopting such an approach would require a radical uprooting of much precedent and practice, as well as being dramatically activist in striking down a great many federal and state laws.

Affirmative action is merely the first example. The second example, federalism, is well known. Judge McConnell has reminded us that the framers of the Fourteenth Amendment ex-

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13. 348 U.S. 483, 486-87 (1955).

14. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 570-71 (1979).

15. See, e.g., Cass R. Sunstein, Op-Ed., *Why We Must Strive For Balance*, CHI. TRIB., July 6, 2005, at A27.

16. See, e.g., Randy Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 *FORDHAM L. REV.* 669, 669 (2006).

pected Congress, not the courts, to be the primary enforcer of Section Five rights.<sup>17</sup> Imagine what they would have made of cases like *Kimel*<sup>18</sup> and *Garrett*.<sup>19</sup> Surely they would have thought that *Hibbs*,<sup>20</sup> the one that deferred to Congress, was the correct case, not the other two.

The objections to the atextual, ahistorical Eleventh Amendment jurisprudence are now commonplace.<sup>21</sup> They need an answer. If one is going to be a principled originalist, one must think of the earnest skeptic, like the Akhil Amar student. Professor Amar sends them out every year happily into the world. They go out into the world like little lambs, eagerly looking for principled debate about originalism. The student, however, finds no answer to legitimate questions. The principled originalist must respond to these charges.

My third and final example of ahistorical originalism involves religion. Judge McConnell has made a very powerful case for the importance of neutrality as the preeminent vision contemplated by the First Amendment.<sup>22</sup> He has said that, according to this neutrality vision, graduation prayers would be difficult to defend on grounds of neutrality.<sup>23</sup> What, then, are we to make of the religious supremacists, like Justices Scalia and Thomas, who know far less of this history than Judge McConnell, but insist that these prayers are constitutional?<sup>24</sup>

Taken together, these three examples amount to more than the thirteenth chime of the clock. They are the most contested

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17. See McConnell, *supra* note 9, at 1111.

18. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

19. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

20. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

21. See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666–68 (2004) (discussing the Court's extension of state sovereign immunity beyond the literal reading of the Eleventh Amendment, and mentioning literature disputing the Court's historical interpretation of the Amendment).

22. See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 149 (1986) (stating that neutrality "is a sound starting point for analyzing religious freedom issues").

23. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116–17 (1992) (suggesting that there should not be "government prayer" at high school graduation ceremonies).

24. *Lee v. Weisman*, 505 U.S. 577, 641–42 (1992) (Scalia, J., dissenting (joined by Thomas, J.)).

issues facing the country, the ones most closely watched—affirmative action, federalism, and religion—and it turns out that the history not only is contested but fails to constrain the Court in any meaningful way. When Justices ignore the history in a way that instead leads to the enactment of what one has to assume are their political preferences, we have to conclude that the claim that originalism is a meaningful way of constraining judges and promoting democracy is illusory.

Indeed, originalists are not constrained when you take the most neutral definition of judicial restraint. I do not want to engage in a dreary discussion about what counts as judicial restraint, because I know that each individual has a different definition. But the definition that Cass Sunstein has offered is both neutral and useful: judicial activism is the decision to strike down a federal or state law, and judicial restraint is the decision to uphold it.<sup>25</sup> This definition does not say whether judicial restraint or activism is good or bad, it just describes it. Judged by this neutral standard, who were the most activist Justices on the Rehnquist Court? They were Justices Kennedy and O'Connor, followed by Justices Scalia and Thomas. Chief Justice Rehnquist and Justices Breyer and Ginsburg were the most restrained.<sup>26</sup> Looking at these results, one can see that the pragmatists, Rehnquist and Breyer, are on the restrained side, but you also find a pragmatist, O'Connor, among the most activist.

My second point, therefore, is that if pragmatism includes both the most activist member of the Court, Justice O'Connor, and one of the most restrained, Justice Breyer, then it must be a very big tent. It is hard to see pragmatism as a reliable constraint on judicial discretion.

Justice Breyer claims that pragmatism is defensible on two grounds. First, that it promotes democracy, and second, that it promotes restraint.<sup>27</sup> Although there is much to be said for his provocative book, these two goals seem to me in tension more often than Justice Breyer acknowledges.

First, consider promoting democracy. Although Justice Breyer respects empiricism, his book does not always offer extensive

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25. Cass R. Sunstein, *A Hand in the Matter*, LEGAL AFFAIRS, Mar.–Apr. 2003, at 27.

26. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 10 (2007).

27. See BREYER, *supra* note 3, at 17.

empirical evidence about the effects of Supreme Court decisions. He claims, for example, that upholding the campaign finance laws would promote democracy because more citizens would participate.<sup>28</sup> But he does not stop to examine empirical evidence suggesting that the same amounts of money have flowed instead through “527” committees, and that the basic proportion of donations has not fundamentally changed.

Similarly, in saying that affirmative action would help people learn how to live together as democratic citizens,<sup>29</sup> Justice Breyer provides no empirical evidence to support his view. Like Justice Brandeis, who claimed to be interested in empirical evidence in theory, but who was not that interested in it in practice,<sup>30</sup> Justice Breyer is vulnerable to the same charge. When Justice Breyer is upholding laws, as he does most of the time, there is no objection because he is acting with restraint. But Justice Breyer is not always restrained. Just as I was disappointed by the originalists who failed to talk about their Achilles’ heel in affirmative action, federalism, and religion clause cases, I was similarly disappointed in Justice Breyer’s vote to strike down vouchers in the *Zelman* case because of the empirically-contested claim that vouchers would promote social divisiveness.<sup>31</sup>

Justice Breyer did not examine empirical evidence that suggests, on the contrary, that by allowing the education of a small percentage of children of minority parents, vouchers might decrease divisiveness rather than promote it.<sup>32</sup> Similarly, in the partial-birth abortion case<sup>33</sup>—another activist decision by Justice Breyer—there was no empirical discussion of whether the law might be construed in a more modest way, which was the way that Judge Easterbrook admirably construed it in a lower

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28. *Id.* at 47–50.

29. *See id.* at 82–83.

30. *See* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 618 (1995).

31. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) (emphasizing “the risk that publicly financed voucher programs pose in terms of religiously based social conflict”).

32. *See, e.g., id.* at 681–83 (Thomas, J., concurring) (discussing evidence relating to the importance of school choice for minorities).

33. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding unconstitutional a Nebraska law criminalizing partial birth abortions because it creates an undue burden on a woman’s right to abortion).

court case,<sup>34</sup> to avoid constitutional difficulties and to affect very few abortions. For all these reasons, although I admire Justice Breyer's book, I am more skeptical than he is that restraint and promoting democracy can always be achieved at the same time.

I will close on a simple note. I find myself losing interest ultimately in the question of which methodology is best in abstract terms. Judges should be evaluated by what they do, not what they say; by their willingness to embody the restrained virtues of modesty and deference, not in theory but in practice. This is the tradition of bipartisan judicial restraint that began with Justices Holmes and Frankfurter, and Justice White embodied it admirably.<sup>35</sup> I have come to regret a juvenile article I wrote years ago on Justice White's retirement,<sup>36</sup> and have come to admire his principled devotion to bipartisan judicial restraint. I hope that Chief Justice Roberts will keep up this tradition on the current Court. He strikes me as more of a pragmatist in the restrained tradition of his predecessor, Chief Justice Rehnquist, than a doctrinaire originalist. But, whatever emerges on the Roberts Court, there is a small and hardy group that is trying to keep alive the flame of bipartisan judicial restraint. Please join us.

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34. *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999) (holding that state statutes criminalizing partial birth abortions "can be applied in a constitutional manner").

35. See Hutchinson, *supra* note 4, at 1409, 1411, 1417.

36. Jeffrey Rosen, *The Next Justice*, THE NEW REPUBLIC, Apr. 12, 1993, at 21.

*Federalist Society Symposium on Originalism*

**II.**

**ORIGINALISM AND PRECEDENT**

*ESSAYISTS*

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# TEXT VS. PRECEDENT IN CONSTITUTIONAL LAW

STEVEN G. CALABREST\*

Conservative constitutional law scholarship is divided into two camps. First, there are the originalists and textualists like myself, Randy Barnett, John Harrison, Gary Lawson, Judge Michael McConnell, Michael Stokes Paulsen, Saikrishna Prakash, and, at times, Akhil Amar. This camp believes that the text of the Constitution, as it was originally understood, is controlling in most constitutional cases. Second, there are the followers of Supreme Court precedent, who sometimes argue incorrectly that they are Burkeans.<sup>1</sup> The latter group includes Charles Fried, Thomas Merrill, Ernie Young, and, in some respects, Richard Fallon. These scholars all follow the doctrine over the document and believe in a fairly robust theory of *stare decisis* in constitutional law.<sup>2</sup> The key case in recent times about which the textualists and the doctrinalists have clashed is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>3</sup>

The argument in this Essay is that the doctrinalists are wrong in arguing for a strong theory of *stare decisis* for three reasons. First, there is nothing in the text, history, or original meaning of the Constitution that supports the doctrinalists' strong theory of *stare decisis*. Second, the actual practice of the U.S. Supreme Court is to not follow precedent, especially in important cases. In other words, precedent itself counsels against following precedent. And, third, a strong theory of *stare decisis* is a bad idea for policy reasons. Each of these three arguments is taken up in turn below.

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1. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 686–87 (2006).

2. See, e.g., Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008).

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

## I. TEXTUALIST AND ORIGINALIST ARGUMENTS

Both textualism and originalism supply arguments as to why following precedent is wrong. As for the text, it is striking that there is not a word in the Constitution that says in any way that precedent trumps the text. Article V specifically sets forth a procedure by which the constitutional text can be changed through the amendment process.<sup>4</sup> Amendment is the *only* process the constitutional text provides for making changes in the document. Five-to-four or even nine-to-zero Supreme Court decisions do not trump the text. Moreover, in the Supremacy Clause, the document says that the Constitution, laws, and treaties shall be the "supreme Law of the Land,"<sup>5</sup> but makes no mention of Supreme Court decisions. It is clear that under the text of the Constitution the Supreme Court has no power to follow its own decisions when they conflict with the text. Moreover, the Supremacy Clause makes *this* Constitution the supreme law of the land, and this Constitution is the one that we know was submitted for ratification under Article VII. The text, then, simply does not support a strong theory of *stare decisis*.

The original history of the Constitution leads to the same conclusion. Records from the Philadelphia Convention and of the ratification debates do not mention anywhere a power of the Supreme Court to follow precedent over constitutional text.<sup>6</sup> Had such a power been contemplated, surely it would have been discussed and debated during the heated and close fight over ratification of the Constitution. Alexander Hamilton does mention in *Federalist No. 78* that the courts might sometimes be bound by precedents, but he does not assert a power to follow precedent where it plainly conflicts with the text.<sup>7</sup> At most, Hamilton's comment and a few other early comments like it suggest a power to follow past interpretations of the constitutional text which are plausible and not in contradiction to the text.<sup>8</sup> No one in the

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4. U.S. CONST. art. V.

5. U.S. CONST. art. VI, cl. 2.

6. See 1-2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911); ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836).

7. THE FEDERALIST NO. 78 (Alexander Hamilton).

8. See Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 86-87 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535,

Framing generation, not even the most committed Anti-Federalists, imagined a doctrine of *stare decisis* trumping the constitutional text of the kind the Justices found in *Casey*.<sup>9</sup>

Moreover, early practice under the Constitution shows that the Framers themselves did not follow a strict theory of *stare decisis* on the most significant constitutional issue of their day—the constitutionality of the Bank of the United States. It is worth rehearsing quickly the history of the debate over the constitutionality of the Bank during the first forty years of the Republic. The Bank of the United States was created in 1791 on the recommendation of Alexander Hamilton. Almost two-thirds of the members of the first House of Representatives and all of the first Senate thought the Bank was constitutional,<sup>10</sup> which is significant because the First Congress was full of delegates to the Philadelphia Convention and the First Congress's decisions thus have always been thought to be especially probative of constitutional meaning. The bill establishing the Bank was signed into law by President George Washington, who had presided over the Philadelphia Convention and without whose support the Constitution would never have been ratified. Washington signed the Bank bill even though his Secretary of State and Attorney General advised him that the bill was unconstitutional.

The question of the constitutionality of the Bank would continue to be debated from when it was first enacted in 1791 until the 1830s. Throughout that period, most of the people who commented on the matter did not think that the question of the constitutionality of the Bank was settled by the first Congress and President Washington having participated in its creation. The Bank was allowed to lapse in 1811 after its twenty-year charter expired, and members of Congress continued to debate its constitutionality. A bill renewing the Bank was ultimately passed by Congress shortly after the War of 1812, and President James Madison signed it into law in 1816,<sup>11</sup> which was significant for several reasons. First, Madison is often called the Father

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1571–76 (2000) (arguing that statements by Hamilton, Madison, and Anti-Federalist writer Brutus about precedent do not show a belief that the judiciary could “assign binding precedential weight to their decisions”).

9. See Paulsen, *supra* note 8, at 1576. *But see* Anastasoff v. United States, 223 F.3d 898, 901–03 (8th Cir. 2000).

10. See Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 248 n.28 (2003).

11. Act of March 3, 1819, ch. 73, 3 Stat. 266 (1816).

of the Constitution because of the important role he played at the Philadelphia Convention and as an author of the *Federalist Papers*. Second, Madison had said in Congress when the First Bank was approved that he thought the Bank was unconstitutional as a matter of original meaning.<sup>12</sup> Third, Madison ultimately let the Second Bank become law because he felt that practice and precedent had settled matters in favor of the Bank's constitutionality. Strikingly, Madison's conclusion on the importance of precedent was to be decisively rejected.

The question of the constitutionality of the Bank finally reached the Supreme Court in 1819 in *McCulloch v. Maryland*.<sup>13</sup> Chief Justice Marshall could easily have said in *McCulloch* that the question of the constitutionality of the Bank had been settled by twenty-eight years of practice and precedent. The Supreme Court had said something similar in *Stuart v. Laird*,<sup>14</sup> where the Court relied on precedent. Instead, Chief Justice Marshall reviewed the question *de novo*, making a number of famous textualist, structural, and originalist arguments. Chief Justice Marshall treated the constitutionality of the Bank as an open question, even after twenty-eight years.<sup>15</sup>

In 1832, a full forty years after President Washington and the First Congress had created the Bank, the question of its constitutionality arose again when the Bank came up for renewal a third time. President Andrew Jackson vetoed the renewal bill on the grounds that the Bank was unconstitutional, and he used key language in his veto message that bears on the issue of precedent. President Jackson said:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where

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12. Smith, *supra* note 10, at 248.

13. 17 U.S. (1 Wheat.) 316 (1819).

14. 5 U.S. (1 Cranch) 299, 309 (1803).

15. *McCulloch*, 17 U.S. at 401.

the acquiescence of the people and the States can be considered as well settled.<sup>16</sup>

For Jackson, forty years after the First Congress and President Washington had approved the Bank, the question of its constitutionality was not well settled. Jackson's veto killed the Bank, and it would not reemerge until eighty-two years later during the administration of Woodrow Wilson, with the creation of the Federal Reserve Board.

Original practice, then, confirms that on the most contested constitutional issue of their day—the constitutionality of the Bank—the second generation of Americans did not follow a precedent set forty years before by the First Congress and President Washington. Early practice thus corroborates what the constitutional text and original history show. The Framers of the Constitution did not espouse a strong theory of precedent in constitutional cases.

## II. ARGUMENTS FROM PRACTICE

Second, the actual practice of the Supreme Court is to not follow precedent, especially in significant cases. According to one count, the Court appears to have overruled itself 174 times, mostly in constitutional rather than statutory cases.<sup>17</sup> D.C. Circuit Judge Laurence Silberman has suggested that the “Supreme Court is a ‘non-court court’” that “rarely considers itself bound by the reasoning of its prior opinions.”<sup>18</sup> Judge Richard Posner, another prominent circuit court judge and scholar of the federal court system, has similarly remarked that “[t]he Supreme Court has never paid much heed to its own precedents—that’s nothing new.”<sup>19</sup> To prove Posner’s point, consider ten big occasions from the last seventy years where the

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16. Andrew Jackson, Veto Message to the Senate (July 10, 1832), reprinted in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144–45 (James D. Richardson ed., 1896).

17. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 46, 47 (2005) (statement of Sen. Sam Brownback).

18. Lederman v. United States, 291 F.3d 36, 48 (D.C. Cir. 2002) (Silberman, J., concurring); see also Benjamin Wittes, *Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, at 39 (quoting this section of Judge Silberman’s opinion).

19. Wittes, *supra* note 18, at 40 (quoting Judge Posner).

Court explicitly or implicitly overruled itself relying upon textual first principles or originalist arguments.

The first is the Constitutional Revolution of 1937. The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique, thus displacing a body of case law that stretched back for almost forty years. In *West Coast Hotel Co v. Parrish*,<sup>20</sup> the Court explicitly overruled its decision in *Adkins v. Children's Hospital of the District of Columbia*<sup>21</sup>—a landmark case. The Court also adopted, as part of the Constitutional Revolution of 1937, a much broader reading of the Commerce and Necessary and Proper Clauses.<sup>22</sup> It reached this reading after returning to first principles and a Marshallian originalist understanding of the scope of national power.<sup>23</sup> The New Deal Court's federalism case law explicitly overruled *Hammer v. Dagenhart*<sup>24</sup> and was also inconsistent with a forty-year-old line of precedent.<sup>25</sup> There can be little question that the Revolution of 1937 constitutes a big break with precedent.

Second is *Erie Railroad Co. v. Tompkins*,<sup>26</sup> which overruled the one-hundred-year-old doctrine of *Swift v. Tyson*<sup>27</sup> on originalist grounds. *Erie* is an unabashed triumph for originalism, because the Court's opinion asserts that *Swift* has been fatally undermined by the historical research of Charles Warren.<sup>28</sup> *Erie* embodies the doctrinalist's worst nightmare about where originalism might lead—a scholar emerges from the library with new evidence about the original meaning of a text and decades of practice gets upended.

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20. 300 U.S. 379, 400 (1937).

21. 261 U.S. 525 (1923).

22. See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (expanding Congress's power under the Commerce and Necessary and Proper Clauses to regulate intrastate activities that, although insignificant individually, are substantial if aggregated); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (interpreting expansively the Commerce Clause to allow Congress to regulate intrastate activities that have a "close and substantial relation to interstate commerce").

23. Calabresi, *supra* note 1, at 642–47.

24. 247 U.S. 251 (1918).

25. See *United States v. Darby Lumber Co.*, 312 U.S. 100, 116–17 (1941).

26. 304 U.S. 64 (1938).

27. 41 U.S. (1 Pet.) 1 (1842).

28. *Erie*, 304 U.S. at 86.

Third, in the Flag Salute Cases, *West Virginia State Board of Education v. Barnette*<sup>29</sup> overruled *Minersville School District v. Gobitis*<sup>30</sup> on textual first principles. *Barnette* was a clear and sharp overruling of a recent and major constitutional precedent. Although it may not be an originalist victory, it is a victory for those who want to use the first principles implicit in the text of the Constitution to make radical changes to the doctrine.

Fourth is *Brown v. Board of Education*,<sup>31</sup> which implicitly overruled *Plessy v. Ferguson*<sup>32</sup> on textualist first principles. The opinion in *Brown* is openly non-originalist,<sup>33</sup> but *Brown* is again clearly a victory for those who want to use the first principles implicit in the text of the Constitution to change sharply the doctrine.

Fifth, the school prayer decision in *Engel v. Vitale*<sup>34</sup> cast aside a 172-year-old Burkean tradition of legal school prayer on the grounds that such prayer violated a hitherto unappreciated original meaning of the Establishment Clause. *Engel* may well be wrong as a matter of originalism, but it is certainly another example of the Supreme Court not caring a whit for precedent or practice.

Sixth, the Court in *Jones v. Alfred H. Mayer Co.*<sup>35</sup> implicitly overruled the *Civil Rights Cases*'<sup>36</sup> conclusions about Section Two of the Thirteenth Amendment for originalist reasons. In this instance, the triumph of the text is also a triumph of original meaning over decades of contrary precedent.

Seventh, in *Gregg v. Georgia*<sup>37</sup> the Supreme Court reinstated the death penalty for originalist reasons after the Supreme Court's decision in *Furman v. Georgia*<sup>38</sup> had called it into question. The Court in *Gregg* quoted at length from the constitutional text and from originalist sources to prove that the death penalty was not always and everywhere unconstitutional.<sup>39</sup>

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29. 319 U.S. 624, 642 (1943).

30. 310 U.S. 586 (1940).

31. 347 U.S. 483, 494–95 (1954).

32. 163 U.S. 537 (1896).

33. *Brown*, 347 U.S. at 489, 492.

34. 370 U.S. 421, 431–32 (1962).

35. 392 U.S. 409, 433–40 (1968).

36. 109 U.S. 3 (1883).

37. 428 U.S. 153 (1976).

38. 408 U.S. 238 (1972).

39. *Gregg*, 428 U.S. at 169–70 & n.17, 173–78.

Eighth is the Supreme Court's Tenth Amendment line of cases. Here, the 1969 decision in *Maryland v. Wirtz*<sup>40</sup> was overruled in 1976 by the five-to-four decision in *National League of Cities v. Usery*,<sup>41</sup> which in turn was overruled by the five-to-four decision in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>42</sup> *Garcia* has itself been rendered a dead letter by *Seminole Tribe of Florida v. Florida*<sup>43</sup> and *Alden v. Maine*.<sup>44</sup> The number of overrulings in this one area of doctrine alone is staggering and suggests an unwillingness by the Justices to adhere to *stare decisis* in constitutional law.

Ninth is the Rehnquist Court's federalism cases, which displaced fifty-eight years of contrary post-1937 case law. *United States v. Lopez*<sup>45</sup> is inconsistent with almost six decades of Commerce Clause case law; *City of Boerne v. Flores*<sup>46</sup> explicitly limits and alters the meaning of *Katzenbach v. Morgan*,<sup>47</sup> *New York v. United States*<sup>48</sup> is inconsistent with *Garcia*; and *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.*<sup>49</sup> Federalism doctrine is clearly another significant area of constitutional law where the Court has acted in ways sharply inconsistent with precedent.

Tenth and finally is the Court's recent overruling of *Bowers v. Hardwick*<sup>50</sup> in *Lawrence v. Texas*,<sup>51</sup> in which the Justices held that a Texas sodomy statute was unconstitutional as a matter of substantive due process.<sup>52</sup> The Court's decision in *Lawrence* not only flew in the face of *Bowers*, but also was inconsistent in its substantive due process methodology with *Washington v. Glucksberg*,<sup>53</sup> the Court's 1997 decision on assisted suicide. *Lawrence* is wrong as a matter of originalism, as I have explained

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40. 392 U.S. 183 (1968).

41. 426 U.S. 833, 855 (1976).

42. 469 U.S. 528, 557 (1985).

43. 517 U.S. 44, 77 (1996).

44. 527 U.S. 706, 739-40 (1999).

45. 514 U.S. 549, 552 (1995).

46. 521 U.S. 507, 516, 527-28 (1997).

47. 384 U.S. 641 (1966).

48. 505 U.S. 144, 210 (1992) (White, J., dissenting).

49. 491 U.S. 1 (1989).

50. 478 U.S. 186 (1986).

51. 539 U.S. 558 (2003).

52. *Id.* at 578.

53. 521 U.S. 702 (1997).

elsewhere,<sup>54</sup> but it is certainly an example of the Court not following—and indeed upending—long-established precedent.

Taken together, these ten explicit and implicit overrulings show that it is simply *not* the Supreme Court's practice to always follow precedent. To the contrary, the Court almost never follows precedent on big issues and in recent times has done so only in *Casey*<sup>55</sup> and in *Dickerson v. United States*.<sup>56</sup> All good Burkeans in this country must admit that we have a tradition here of following the written Constitution and not Supreme Court case law.<sup>57</sup> Thus, in the United States, Burkeanism leads back to the text.

### III. POLICY ARGUMENTS AGAINST FOLLOWING PRECEDENT

Third, and finally, for two main reasons, it is not a good idea as a matter of policy for the Supreme Court to follow strictly its own precedents.

First, it is almost impossible to amend the Constitution.<sup>58</sup> The United States has the most difficult constitutional amendment process of any major democratic country.<sup>59</sup> Constitutional amendments must receive a two-thirds vote in both Houses of Congress and be ratified by thirty-eight states (three-fourths of the current fifty) to become law.<sup>60</sup> If only one house of thirteen state legislatures rejects a constitutional amendment, the amendment is dead. The thirteen least populous states have a combined total of less than 5 percent of the U.S. population,<sup>61</sup> which means that, in theory, constitutional amendments in the

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54. See Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1108–09 (2004).

55. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

56. 530 U.S. 428, 432 (2000).

57. See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1438–42 (1997).

58. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 126 n.31 (1996).

59. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 369 (1994).

60. U.S. CONST. art. V.

61. See U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006*, at tbl. 1 (2006), <http://www.census.gov/popest/states/tables/NST-EST2006-01.xls>.

United States could be supported by more than 95 percent of the American people, and they could still fail to be ratified.

A strict rule of *stare decisis* in constitutional cases, therefore, would make it impossible to ever correct the Supreme Court's errors, even by appointing new members and hoping for overrulings. It would eliminate the only formal check on the Supreme Court that actually works. The other two checks are the amendment process, which as I have already explained does not work, and, in theory, impeachment, which could be a check on the Supreme Court but has never been used successfully in two hundred years. So, if one thinks the Supreme Court is going to make mistakes, it is necessary to be able to correct those mistakes by getting them overruled.

It simply cannot be good public policy to allow less than 5 percent of the population to have an absolute veto on changes in Supreme Court doctrine, but it is, in practice, the result of a strict rule of *stare decisis*. Given the casual way in which the Court decides cases, and given the Court's frequent refusal to be bound by text, original meaning, or precedent, it would be a mistake to eliminate the only effective check on the Supreme Court.

Second, a strict rule of *stare decisis* is a mistake for policy reasons because it fails to take account of the long time horizon one should have in constitutional law. Thus, the need for a long-term view invalidates the arguments of leading doctrinalists like Professor Thomas Merrill, who argue that the Supreme Court ought to follow precedent because it: (1) promotes the rule of law; (2) preserves continuity with the past; (3) reflects an appropriate skepticism about powers of human reason; (4) enhances democratically accountable lawmaking; and (5) promotes judicial restraint.<sup>62</sup> Let us examine each of Professor Merrill's five arguments in turn, asking whether they would countenance overruling the thirty-five-year-old precedent of *Roe v. Wade*,<sup>63</sup> a case that Professor Merrill thinks *stare decisis* protects.<sup>64</sup>

First, would the rule of law be promoted by retaining or overruling *Roe*? The answer depends on the length of the time horizon. Is it more important to the rule of law to be consistent

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62. See e.g., Merrill, *supra* note 2.

63. 410 U.S. 113 (1973).

64. See Merrill, *supra* note 2, at 977.

with the constitutional law on abortion of the last thirty-five years or is it more important to be consistent with the tradition of banning abortions outright from the mid-nineteenth century to 1973? Is it more important to the rule of law to maintain abortion rights or more important to get rid of the doctrine of substantive due process, which led to *Dred Scott v. Sandford*<sup>65</sup> and to *Lochner v. New York*?<sup>66</sup> In constitutional law, one ought to take the long view. Being consistent with centuries of law regulating abortion and getting rid of the destabilizing constitutional monstrosity of substantive due process does more to promote the rule of law values of stability and consistency than following a thirty-five-year-old precedent that was controversial from the day it was handed down.

Second, is continuity with the past best promoted by retaining or overruling the thirty-five-year-old precedent of *Roe v. Wade*? Again, the answer depends on whether one adopts a long- or a short-term time horizon in constitutional law. Do we want to be consistent with the past thirty-five years or with centuries of laws regulating and forbidding abortions? In constitutional law, one's time horizon must be multi-generational and not confined to the past thirty-five years. The whole point of constitutional law is to allow one generation to bind its descendants by enshrining fundamental rights in the Constitution.<sup>67</sup> The enterprise of inter-generational lawmaking would become impossible if one preserved continuity with only the recent past and not with the last few centuries. Again, continuity with the past is best preserved by overruling *Roe*.

Third, is skepticism about the powers of human reason most enhanced by retaining or overruling *Roe*? Once again, the answer is clear. For hundreds of years, it has been our tradition to forbid abortion from the moment we first knew that fetal life had come into being.<sup>68</sup> The common law banned abortion from the time of quickening onward, and it was outlawed altogether in the nineteenth century once we learned that fetal life starts before quickening.<sup>69</sup> Skepticism about the powers of human

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65. 60 U.S. (19 How.) 393 (1856).

66. 198 U.S. 45 (1905).

67. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

68. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281–82 (1992).

69. *Id.*

reason should counsel in favor of deference to longstanding practice and not to a controversial thirty-five-year-old dictate. Conservatives tend to agree with Friedrich Hayek that tradition embodies the wisdom of the ages and is a spontaneous source of order that ought to be followed.<sup>70</sup> Calling a Harry Blackmun opinion from 1973 the wisdom of the ages, however, strains credulity. Skepticism about the powers of human reason suggests *Roe* ought to be overruled.

Fourth, is democratically accountable lawmaking enhanced or diminished by overruling *Roe*? Again, the answer is obvious: *Roe* took the highly charged question of abortion and removed it from the legislatures of the fifty states while creating a sweeping and congressionally unalterable rule. Overruling *Roe* would not make abortion illegal, but would simply return the question to the fifty state legislatures, most of which would probably keep abortion legal.<sup>71</sup> Supporters of *Roe* argue that there are powerful reliance interests on the part of women that have grown up around *Roe* and counsel in favor of keeping abortion legal.<sup>72</sup> If their argument is true, then there is every reason to expect that state legislatures will respond to the wishes of women, who are a majority of the population. There is no question that democratically accountable lawmaking is enhanced by overruling *Roe* and not by retaining it.

Fifth and finally, does judicial restraint counsel in favor of overruling or retaining *Roe*? Overruling *Roe* means no more invalidations of state and federal laws regulating abortion, and it is the striking down of democratically-initiated, constitutionally-permissible laws that constitutes judicial activism. The defenders of *Roe* like to play on words by implying that it is "activist" for the Supreme Court to overrule *Roe* because the Court would be taking action.<sup>73</sup> To the contrary, refusing to continue a practice of striking down abortion laws is not activist; it is restrained. Judicial restraint counsels in favor of overruling *Roe*.

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70. See, e.g., F.A. von Hayek, *The Trend of Economic Thinking*, 40 *ECONOMICA* 121, 129 (1933).

71. See Mary Ann Glendon, *A World Without Roe: How Different Would it Be?*, *HASTINGS CENTER REP.*, July-Aug. 1989, at 30, 30.

72. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

73. See, e.g., Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 *MD. L. REV.* 118, 135-36 (1987).

Constitutions are about inter-generational lawmaking where one generation binds the next.<sup>74</sup> Accordingly, it is a mistake to think that it demonstrates restraint for the Court to follow a thirty-five-year-old precedent rather than the tradition of the last millennium where we never condoned aborting a life in the womb once we knew it had begun. Judicial restraint and the rule of law are promoted when we follow the fundamental constitutional principles of our great-grandfathers, secure in the knowledge that if we pass an Equal Rights Amendment or a Balanced Budget Amendment, it will be followed by our great-grandchildren. This is what constitutional government is all about.

#### CONCLUSION

In summary, the text of the Constitution, its original meaning, the early practice of the Framers, the modern practice from 1937 to 2008, and policy arguments all counsel in favor of textualism and against a strong theory of *stare decisis* in constitutional cases. Conservatives in the United States ought to embrace textualism and originalism in place of rule by a biased, lawyerly elite on the Supreme Court. True Burkeans in the United States will realize that America's tradition is one of following the written Constitution, and not the decisions of five superannuated life-tenured lawyers. It is not our practice slavishly to follow precedent and there is no good reason why we should suddenly make that our practice today.

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74. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).



## ON TEXT AND PRECEDENT

AKHIL REED AMAR\*

Until recently, the conversation on originalism and the role of precedent has been dominated by two main camps, which I will call unoriginal originalists and unprecedented precedentialists. Unoriginal originalists refers to people who purport to pay close attention to text, history, and structure, but when these sources conflict with precedent, this camp basically does not have a theory at all. The theory becomes a sort of muddling through, sometimes following precedent and sometimes not. If one, however, is just going to muddle through, or be pragmatic about when to follow precedent, does that not undercut the very grounds on which one is an originalist in the first place? Why not then muddle through across the board or be pragmatic across the board?

It is tolerably clear, for example, that the exclusionary rule is completely made up from a constitutional perspective, and that no Framers ever believed that illegally seized evidence should be excluded from court; that England never had an exclusionary rule; that the Fourth Amendment definitely does not provide for an exclusionary rule; and that no state excluded evidence for the first hundred years after the Declaration of Independence, even though most of the states had Fourth Amendment counterparts.<sup>1</sup> If anything is clear, it is that the exclusionary rule is inconsistent with the original meaning of the Fourth Amendment, yet none of the supposedly originalist Justices on the Supreme Court reject the exclusionary rule. Even Justices Scalia and Thomas exclude evidence pretty regularly, and never quite tell us why they do so when it means abandoning the original meaning of the Fourth Amendment.<sup>2</sup>

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1. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 93–94 (2000).

2. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring (joined by Thomas, J.)).

What originalists ought to do is to deduce a theory of precedent from the text, history, and structure of the Constitution itself, and thus to see what are the proper metes and bounds of precedent. We have not seen a sustained effort to deduce such a theory yet, which is why we have unoriginal originalists.

The other side of the text versus precedent debate fares no better. On the other side are the unprecedented precedentialists—scholars and Justices who cannot explain why sometimes the Court ought to overrule and sometimes it ought not to overrule. Consider the following important statement from the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:<sup>3</sup> “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”<sup>4</sup> This point of view has recently carried the day on the modern Supreme Court, at least since the *Casey* decision.<sup>5</sup> The problem with this thesis is that it is inconsistent with both pre-*Casey* and post-*Casey* precedent. The *Casey* Court claims that its view of precedent—the view that a decision to overrule should rest on some special reason over and above the belief that the prior case was wrongly decided—has been “repeated in our cases.”<sup>6</sup> To support that proposition, however, the Court cited only dissents!<sup>7</sup> Neither of the dissents cited was squarely on point, which leaves the careful reader with a sneaking suspicion that perhaps the *Casey* Court’s view of when to overrule precedent was not well-established in the pre-*Casey* case law.

A strict count of the number of cases where the Supreme Court overruled itself on the basis of text, history, and structure alone, which excludes cases where there were overrulings because the doctrine was unworkable or because of some other pragmatic or doctrinal consideration, reveals five important cases in the twentieth century pre-*Casey*, and there may well be more.<sup>8</sup> This includes only pure, naked overrulings; that is, instances where the Court overruled itself based only on a

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3. 505 U.S. 833 (1992).

4. *Id.* at 864.

5. *See, e.g.,* *Randall v. Sorrell*, 548 U.S. 230, 242–44 (2006).

6. *Casey*, 505 U.S. at 864.

7. *Id.* (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)).

8. *See* Amar, *supra* note 1, at 34 n.28 (collecting cases).

changed view of the original meaning of the constitutional provision in question, effectively holding that the underlying case was wrong as an originalist matter. Analysis of these cases leads to the conclusion that *Casey* put forward a view of the sanctity of precedent that was itself unprecedented.

A summary of the views presented in my *Supreme Court Foreword* published in the *Harvard Law Review* in 2000 sheds light on the question of when to overrule a precedent based on the original meaning of the document itself.<sup>9</sup> The *Foreword* talks about a great principled divide that cuts across liberalism and conservatism in constitutional law scholarship. This great principled divide among lawyers separates out documentarians—people who believe in the primacy of text, history, and structure, like Steven Calabresi on the Right,<sup>10</sup> or Justice Hugo Black on the Left<sup>11</sup>—and the great doctrinalists in constitutional law—like David Strauss on the Left,<sup>12</sup> or the second Justice Harlan on the Right.<sup>13</sup> I argue that there is a great distinction in principle between those who pay more attention to the document and those who tend to privilege the doctrine.

I side with the documentarians, and thus I will try, from the perspective of the document, to give you its account of doctrine. It is an account in which doctrine has an important but ultimately subordinate place. A thoroughgoing commitment to the document would leave vast space for judicial doctrine, but doctrine would ultimately remain subordinate to the document itself. Article III of the Constitution proclaims that the text of the Constitution is to be enforced as justiciable law in ordinary lawsuits.<sup>14</sup> Therefore, the document itself envisions that in deciding cases under it, judges are going to offer interpretations, give reasons, develop mediating principles, and craft implementing frameworks to enable the document to be construed in courts as law. These interpretations, reasons, principles, and

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9. Amar, *supra* note 1.

10. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

11. See, e.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

12. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

13. See, e.g., Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991).

14. See U.S. CONST. art. III, § 2.

frameworks are, in a word, doctrine, and the Constitution contemplates that doctrine will exist.

In *McCulloch v. Maryland*,<sup>15</sup> the great Chief Justice Marshall properly reminded us that our Constitution does not and cannot partake of the complexity of a legal code.<sup>16</sup> Why? Because if it were that detailed, it would not have been understood by the public—the people who had to read it to decide whether to vote it up or down in the ratification process. Consequently, the broad dictates of the Constitution, in order for the document to work in court, will have to be concretized in all sorts of ways.

Consider the Fourth Amendment: It establishes general parameters. The parameters are not, according to the text, that every search and seizure requires probable cause,<sup>17</sup> no matter what some legal scholars may claim. It does not say that a warrant has to issue before each and every search can take place. It does not say that the exclusion of evidence is the proper response to an illegal search.

The text creates parameters, but it does not specify what they are. What the text does say is that every search and seizure has to be reasonable. What does an open-ended word like “reasonable” mean in this context? Interpreting it requires a vast number of strategic, pragmatic, empiric, institutional, second-best judgments by courts about how to create a framework of what searches are reasonable in today’s world. Thoroughgoing documentarians do not mean to displace such an inquiry, so long as the doctrine really does properly exist as an implementation of the proper principles that people did authorize.

Documentarians do not begin and end with the document. We begin with the document, insist on its priority and fundamentality, and try to ponder how to translate that wisdom into rules that can be made to be enforceable in court. To think about those rules in court, one must distinguish between a supreme court and inferior courts. Inferior courts, in general, are not judicially authorized to disregard the doctrine of the Supreme Court, even if those inferior courts think that doctrine is wrong, because the Constitution itself creates a structure of ver-

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15. 17 U.S. (4 Wheat.) 316 (1819).

16. *Id.* at 407.

17. See U.S. CONST. amend. IV.

tical authority.<sup>18</sup> There may be rare cases in which a judge might act as a civil disobedient—Michael Paulsen has written very acutely about that problem<sup>19</sup>—but there is no general judicial authority of an inferior to overrule or, if you will, underrule or undermine the views of the Supreme Court, even if the inferior judge thinks that the Supreme Court's rules are incorrect.

Should the Supreme Court be bound by its own prior precedents? Here again, the document provides broad outlines to the answer, even though it does not answer all the questions that are raised by this issue. The Constitution creates the Supreme Court as a continuous body, and as a continuous body it is ideally structured to consider what it has done in the past and to anticipate what it will do in the future. The institutional design suggests precedent may properly be taken as the default rule. There ought to be a presumption that the Court will do again what it has done before, unless and until the Justices are persuaded that their prior decision was wrong. Accordingly, it makes sense to say that the burden of proof is on someone who wants to prove that a precedent is mistaken, just as the burden of proof ought also to be on someone who wants to prove that a law is unconstitutional. We have a presumption of the constitutionality of statutes, and someone who wants to overcome that presumption must give reasons if they are going to succeed in doing so. In other words, the Court ought not to treat its precedents as if they were more important than statutes, which are the people's own pronouncements. Rather, the Court should treat precedents as if they are comparable in force to statutes; that is to say, as if they are on a coordinate par with statutes.

Courts might not only treat a past precedent as a default or starting point; they may even give it a certain epistemic weight. That our predecessors, who were thoughtful men and women, came to a certain result might be a reason for thinking that result is actually the right one. It is not an irrebuttable reason, but if the precedent came from the pen of John Marshall, for example, it might be a very strong reason.

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18. See U.S. CONST. art. III.

19. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2733–34 (2003).

Nonetheless, even when the Court comes to a settled conviction that the previous decision was a mistake and that the burden of proof has been overcome, *Casey's* principle suggests that the Justices are not even going to try to state whether what the Court did was really a mistake in the previous case. For the Court to do that is for the Court to privilege its own case law even more than statutes. After all, when Congress makes a constitutional mistake by passing an unconstitutional statute, the Court is happy to say that Congress has made a mistake, and to correct it.<sup>20</sup>

There are other reasons why certain precedents are entrenched against reversal. Some mistakes may have been ratified by the people in some way, or ratified by the passage of time. Another structural feature of the judiciary is that it acts late in the process, only after the legislative and executive branches have already acted. Thus, a case involving the constitutionality of the Bank of the United States reached the Supreme Court many years after the political branches had passed on the question.<sup>21</sup> Chief Justice Marshall noted in *McCulloch* that there had been important reliance interests created by the Bank that the Court could not lightly disrupt.<sup>22</sup> These reliance interests are why we have a presumption of constitutionality when it comes to statutes. Because courts act later in time, and act on things that have already happened, courts must have a certain respect for the reliance interests that may have grown up around a law. Similarly, certain precedents may have been, in important respects, relied upon by institutional actors. Still, the existence of such reliance interests goes only to the question of what is a proper judicial remedy for a mistake. It does not go to the question whether a mistake was made in the first instance.

It might very well mean that the Supreme Court cannot undo its mistakes on a dime, but the Court's first obligation, when it has made a mistake, is to tell us that it has and at least issue a declaratory judgment to that effect. Perhaps Congress or a state legislature will respond to the news that the Supreme Court made a mistake by phasing in a new regime over a course of

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20. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

21. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-02 (1819).

22. *Id.* at 401.

years; legislatures can act differently in some ways than the Supreme Court. Perhaps the Supreme Court will respond to the conclusion that it made a mistake by gradually trying to get back to a proper constitutional approach. But it does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news. The Court should not, as it did in *Casey*, say that it refuses to overrule a mistake because telling the truth would undermine the people's confidence in the Supreme Court.<sup>23</sup> Such language is unprecedented and in tension with the Constitution itself.

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23. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–69 (1992).



# WHY CONSERVATIVES SHOULDN'T BE ORIGINALISTS

DAVID A. STRAUSS\*

The revival of originalism in the last generation has been, for the most part, the work of conservatives. That makes it easy to think that originalism and legal conservatism are natural allies. But in fact the alliance is an alliance of convenience, and, before too much longer, it is going to outlive its usefulness. Or at least so I will argue in this Essay. The cause of legal conservatives would be much better served if conservatives would abandon their allegiance to originalism and instead adopt an approach to constitutional interpretation that is based in precedent—an approach that seems to me vastly more sound in any event.

Any theory of interpretation, including originalism, can produce sharply different results, depending on who is using the theory. Of course any theory might be used in bad faith, but that is not what I mean. The point is that even good-faith interpreters can reach different results with the same theory. That is why one quick way to test the soundness of a theory of interpretation is to ask the question: What theory would you want your opponents to use, if you could assign a theory to them? If your political opponents were, say, appointing Justices to the Supreme Court, would you want those appointees to believe in originalism, or in some other view, such as one based on precedent? It seems to me that once you ask that question, you are going to conclude that a precedent-based approach is superior to originalism, even if you have conservative inclinations.<sup>1</sup> The reason is twofold: originalism makes it too easy for people to find, in the law, the

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1. See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (discussing reasons why “a strong theory of precedent” leads to judicial restraint).

answers they are looking for; and originalism causes people to hide the ball, to avoid admitting, perhaps even to themselves, what is really affecting their decisions.

There are at least three reasons why originalism, contrary to appearances, in fact imposes only a very uncertain limit on judges and leaves them a great deal of latitude to find, in the original understandings, the outcomes they want to find—something that, as I said, may be fine if you want those same outcomes, but is not fine if your opponents are running the show. The first is what might be called the problem of ascertainability. At least when you are dealing with old constitutional provisions, which nearly all the controversial provisions of our Constitution are, it will be very hard to do the historical work needed to determine what the original understandings were. Partly this is just a technical problem of becoming conversant with all the relevant materials. But the greater problem is knowing what inferences to draw from those historical materials. Especially in dealing with highly controversial issues, ascertaining the original understandings will routinely require a thorough immersion not just in the context of the specific debate but in the culture of the time. It is a lot to expect a busy judge to do that competently, and it will be all too easy to seize on any evidence that supports the view of the Constitution that the interpreter himself prefers.

Let me give an example of just how intractable this basic problem of ascertainability is. In a terrifically interesting law review article, Judge Michael McConnell has argued that, contrary to the conventional wisdom that was entrenched for a generation, *Brown v. Board of Education*<sup>2</sup> was consistent with original understandings.<sup>3</sup> I'm not sure Judge McConnell is correct, but let's assume he is. Now consider the following: In 1953, the Supreme Court asked the lawyers in *Brown* to brief the question of what the framers of the Fourteenth Amendment understood it to say about school segregation.<sup>4</sup> The best lawyers and historians in the country were engaged in the project of trying to find an originalist justification for the outcome they desired,

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2. 347 U.S. 483 (1954).

3. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

4. Miscellaneous Orders, 345 U.S. 972, 972 (1953).

which was the unconstitutionality of segregation. They spectacularly failed. The opinion in *Brown* begins with what can only be read as a concession that the original understandings do not support the conclusion the Court reached, that the Fourteenth Amendment forbids racial segregation.<sup>5</sup>

If Judge McConnell is right, and the original understanding actually does condemn school segregation, that means that the best lawyers and historians in the country, as well as the Supreme Court Justices and their clerks, with all the resources available to them and with every incentive to discover the original understanding, did not succeed in recovering that original understanding. This really should give originalists pause. Everyone is familiar with the argument that originalism is unacceptable because it would lead to a different result in *Brown*. But if Judge McConnell is right, and originalism actually supports the holding in *Brown*, that may be an even bigger problem for originalists. It means that, even in close to ideal circumstances—when all the resources and incentives were in place to figure out the original understandings—everyone still got the original understandings wrong.<sup>6</sup>

Even if you can solve the problem of ascertainability, there is a second problem, the problem of indeterminacy, that may be just as severe. The original understandings might—quite clearly—*not* resolve the issue at hand. This problem is familiar in the ordinary legislative process. The people involved in drafting and adopting a provision might not have foreseen a particular issue that later arises under that provision. Or they might agree on a form of words but disagree on what the form of words is going to mean; indeed the words might have been chosen precisely because they can accommodate diverging understandings. Here, again, there is a real risk that an interpreter, although acting in good faith, will see what he or she wants to see in the original understandings.

The third problem, related to the problem of indeterminacy, might be called the problem of translation. Suppose you've successfully figured out what the original understandings were. And suppose that, providentially, those understandings

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5. *Brown*, 347 U.S. at 489–90.

6. See David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 304–06 (2005).

would have given a definitive answer to the question you're interested in, had that question arisen when the constitutional provision was adopted. Even then, if the provision is an old one, it is routinely not going to be clear what those understandings say about that issue today. Unless the original understanding was "here is how we are going to answer this question now and forever," it will be difficult to respond to the argument that the original understanding dealt with the problems people were confronting at the time, in the society in which they lived, with the technology they had, and with the population they had. The question remains: what was their understanding about how those problems should be confronted in a wholly different world, like the one in which we live today?

It is theoretically possible that the original understanding will be that a particular constitutional provision settled a specific issue for all time. For example, the original understanding of a provision could be that the federal government should never regulate some particular kind of activity, no matter what. But as a practical matter, it is very unlikely that the original understanding of a constitutional principle would have that character, or that a judge could, with confidence, determine that it did. The original understanding is much more likely to be focused on contemporary times, rather than on other circumstances that might have been literally unimaginable to the people who adopted the provision. The difficult follow-up question then becomes: how do we translate that original understanding for our time? And that question virtually invites the present-day decisionmaker to impose his or her own solution, in the guise of channeling the original understandings.

At the root of these difficulties with originalism is the lack of any generally accepted justification for following the original understandings across the board. There is no real answer to Thomas Jefferson's famous question of why we should allow the dead to rule the living.<sup>7</sup> In fact, although some originalists do try to grapple with that question, most don't. The appeal of originalism to most originalists, I believe, is not some sense of fealty to past generations. Rather, originalism is appealing be-

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7. For a discussion, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

cause there does not seem to be a plausible competitor.<sup>8</sup> The idea is that if judges don't follow the original understandings, they will be free to do whatever they want.

But if that is the concern—unfettered judicial discretion—a precedent-based theory is far better than originalism. Professors Calabresi and Amar have argued very powerfully that precedent is manipulable, and of course they are right. Judges pick and choose among precedents, often overrule precedents, and follow precedent uncertainly.<sup>9</sup> But it seems to me that originalism is much more manipulable. As a practical matter, precedent closes off many options. This is an everyday and, I think, incontrovertible fact for lower court judges, and Supreme Court Justices differ only in kind, not in degree. The options open to them are sharply limited by, and substantially structured by, precedent.

Some opponents of a precedent-based approach to constitutional interpretation say that there is really no theory of precedent. But that is not correct, either. I don't think the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>10</sup> gives a particularly good account of the theory, but the theory has, in fact, been around for centuries. It was developed, over time, by common law lawyers, and it finds its most famous expression in Burke's great work.<sup>11</sup> The theory is one of humility; of respecting the limits of human reason; and of making judgments about morality, fairness, and justice, but making them only within the narrow confines left open by tradition. It is not an algorithm; it does not dictate results. It does not preclude judges from making judgments about what is right and wrong, and from allowing those judgments to influence their view of what the law is, but it limits the scope within which those judgments can influence legal conclusions.

The evil of school segregation ought to have been part of the reason for the outcome of *Brown v. Board of Education*, emphasis equally on the words "ought" and "part." If you think abortion

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8. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

9. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006).

10. 505 U.S. 833 (1992).

11. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1793).

is evil, that ought to be part of the reason for calling for the overruling of *Roe v. Wade*;<sup>12</sup> again, emphasis on the word "part." A common law approach insists that judges are sharply limited by precedent, but it does not suggest that precedent always determines the outcome of a case—obviously not—and, more important, a common law approach to constitutional interpretation allows judges and other interpreters to say that part of the reason for a result is that that result is more fair or is better policy. Sometimes precedent fairly read will foreclose every result but one. But sometimes it will only narrow the range of acceptable results. In such instances, if one outcome—authorized although not dictated by precedent—seems to be much more sensible or more just, the judge may openly rule that way.<sup>13</sup>

The great virtue of the common law approach is that while it does substantially limit the acceptable results in a case, it also—within those limits—allows for a kind of candor that originalism tends to suppress. The temptation, for an originalist, is to "discover" that the original understanding about some controversial issue is, conveniently, identical to one's own views. They were so wise back then! The originalist can then present the outcome of a case as simply a matter of following the will of the Framers and avoid admitting, perhaps even to himself, that he is reaching a result in part because he thinks it is right as a matter of policy.

A common law approach, by contrast, acknowledges that precedent sometimes takes a judge only so far and leaves the judge with a degree of flexibility; the rest is a judgment based on other normative grounds. A common law approach does not suppress the basis of disagreements by insisting that constitutional law is only about what the original understanding was and that the decisionmaker's own views play no role at all. In a word, then, both originalism and a precedent-based, common law approach leave a range of issues unresolved. My own view is that originalism, for the reasons I listed earlier, leaves a much wider range of issues unresolved. But whether or not that is so, the common law approach has the virtue of acknowledging its own indeterminacy and encouraging candor to a greater degree than originalism does.

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12. 410 U.S. 113 (1973).

13. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 900–03 (1996).

But why should conservatives, in particular, shun originalism? The reason is that originalism's characteristic features—ersatz determinacy, coupled with an appeal to foundational sources, all concealing an unexpressed normative agenda—makes it a decidedly non-conservative rhetorical weapon. Originalism, precisely because of these features, provides a set of arguments that can be used by people who are unhappy with the *status quo*. If a judge thinks that what has been built up over time is corrupt and wants to sweep it away, one excellent rhetorical strategy is to claim to go back to first principles and get rid of everything that has happened since.

This is apparent in the career of the Supreme Court Justice who was by far the most successful originalist of the last century—and who was not a conservative at all. Justice Hugo Black used originalism in just the way I describe, to attack what was, in his view, a corrupt tradition. For Justice Black, it was the tradition of the pre-New Deal Court. Justice Black attributed to the Framers of the Constitution the New Deal consensus on judicial review of economic legislation and what came to be regarded as the Warren Court views on civil rights and civil liberties. Present-day conservative originalists are attacking what they see as a different, corrupt judicial tradition.<sup>14</sup> They, too, turn to originalism. The original understandings are available as a weapon to those who want to attack a corrupt tradition, but they are available to almost anyone, just because originalism is so flexible and open-ended, and because it conceals what is really going on.

Increasingly, though, our constitutional order is becoming something that conservatives like. The tradition is a conservative one. When the next generation of liberals wants to attack what the current generation of conservatives has accomplished, those liberals, some of them anyway, will, I'm betting, invoke the original understandings. They will, in good faith and with some degree of accuracy, find material in the original understandings that will support their cause—precisely because originalism is such an indeterminate, open-ended approach.

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14. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741–42 (2007) (describing the efforts of “movement-Republicans” to change the *status quo* by promoting originalist judges).

Conservatives could do themselves a tactical, rhetorical favor—and, more important, refocus the constitutional debate on the real bases of disagreement—if they stopped embracing originalism now. The debate should not be over who has best captured the original understandings. That debate just invites manipulation and intellectual disingenuousness, and—Jefferson’s point—it is not clear why it’s relevant anyway. The debate should instead be conducted in fully candid terms, in which judges and others acknowledge that the law is determined in part but not entirely by precedent; and in which people avow and defend the normative commitments that are influencing their decisions, instead of attributing their views to the founding generations.

# THE CONSERVATIVE CASE FOR PRECEDENT

THOMAS W. MERRILL\*

This Essay offers some reasons why conservatives should favor giving great weight to precedent in constitutional adjudication. Let me start with some preliminary observations about the debate between originalism and precedent more generally.

First, the debate has been dominated to far too great an extent by specific cases, *Roe v. Wade*<sup>1</sup> in particular. It is distressing that the only issue that has seemed to matter in recent confirmation hearings is what a nominee thinks about *Roe v. Wade*. Similarly, in the precedent versus originalism debate, much of the discussion—even in the law reviews—is animated by what commentators think about *Roe v. Wade*. So, if you think *Roe v. Wade* was an illegitimate usurpation of power by the judiciary, and you want to overrule it, it somehow follows that you think all constitutional law should be based on something other than precedent. On the other hand, if you like *Roe v. Wade*, and you want to reaffirm it, somehow all precedent must be a good thing. This is an extraordinarily myopic way of thinking about the problem. Those who regard themselves as conservatives and embrace some of the values that David Strauss mentions—the rule of law, stability and predictability in the law, judicial restraint, the belief that social policy decisions should be made by elected representatives of the people rather than by the judges<sup>2</sup>—should not have their views on precedent versus originalism driven by one case.

Second, we cannot resolve the debate by adopting the conceptual apparatus of one school or the other, and by pointing out that the rival approach has no place within the conceptual apparatus we adopt. To a large extent, originalism and precedent reside in parallel universes that do not intersect. The case for originalism starts with legal positivism, the idea that only

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1. 410 U.S. 113 (1973).

2. See David Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008).

enacted law is the law of the land.<sup>3</sup> Starting from this assumption, it follows that when there is an ambiguity in the law, we should try to resolve it by determining the meaning of the law-giver. Such an approach naturally leads to looking at original sources for interpreting the law. As Steven Calabresi implicitly frames the question, "Does originalism say that precedent can trump the enacted law?"<sup>4</sup> The answer, of course, is "No, it does not." If we start from originalist premises, we do not leave much room for precedent or *stare decisis*.

Conversely, if one starts from the universe of precedent, that universe is founded in the Holmesian observation that the law is, ultimately, the judgments of the courts.<sup>5</sup> If you adopt this perspective, you say, "Well, what predicts the judgments of courts is the precedents of courts, and therefore precedent is law." So, if we want to know whether or not following precedent is permissible, we find the answer by looking to precedent. And guess what we find? Judges say we ought to follow precedent. So precedent it is. This universe does not leave much space for the Constitution and enacted law. Thus, we have two parallel universes that operate on different planes: the universe of enacted law, and the universe of judge-made law. One cannot reason from the premises of one to oust the other.

The reality is that every Justice, at least since the days of the Marshall Court, has relied to some extent on both originalist reasoning and precedent. Professor Calabresi is absolutely correct that when moments of high drama and crisis arise, the Justices tend to revert to the constitutional text and to the statements of the Framers.<sup>6</sup> On the other hand, studies of the Justices have indicated that approximately eighty percent or more of the authorities they cite in their constitutional opinions are precedents of the Supreme Court.<sup>7</sup> The most careful study examined the opinions of Justices Rehnquist and Brennan, who were the prototypical ideological outliers at the time the study was conducted.<sup>8</sup> Presumably, centrist judges rely on precedent to an

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3. See, e.g., Steven Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 948 (2008).

4. *Id.*

5. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 61 (1897).

6. See Calabresi, *supra* note 3, at 951-55.

7. See Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 583, 594 (1991).

8. *Id.* at 594.

even greater extent. Even Justices Scalia and Thomas routinely rely on precedent. To some extent, then, precedent also has to be considered in the equation.

A final preliminary point is that the ultimate question for conservatives or people who value the rule of law is not so much what theory a judge applies, but rather the attitude with which the judge approaches the task of deciding cases. We want our judges to apply the law in good faith, seeking the best answer that the law provides, rather than attempting to advance their personal policy preferences by manipulating legal authorities to reach certain predetermined ends. It is very hard to legislate this attitude.

Lawyers are familiar with these competing approaches because clients sometimes ask lawyers to tell them what the law is on some point, so the client can correct or guide her behavior accordingly. When the lawyer gets such a request for fair and impartial advice, he adopts one approach to analyzing legal authorities. On other occasions, the lawyer may be asked to defend a position a client has already taken, as by filing a brief in court. In this situation, the lawyer is in the position of being an advocate, and so adopts a very different mode of spinning legal authorities. Judges ideally should adopt the first or investigatory mode in deciding cases, not the second or spinning mode. That is, judges should seek to determine what the law is, not what it should be. But it is very hard to prescribe this attitude by using any particular technique of decision making.

Having said that, I think that technique does matter at the margins; the key issue here in terms of precedent versus originalism is whether the courts should adopt a strong theory of precedent in constitutional law cases—as they already have done in cases of statutory interpretation<sup>9</sup>—or whether they should adopt a weak theory. Steven Calabresi and Akhil Amar argue correctly that the Supreme Court is speaking with a forked tongue when the Justices profess to have a strong theory of precedent in constitutional law.<sup>10</sup> At least since *Casey* they have in fact employed a weak theory of precedent. For a number of reasons, a strong theory of precedent would be better. Professor Strauss has given several excellent reasons. In the

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9. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . .”).

10. See Calabresi, *supra* note 3, at 951; Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL’Y 961 (2008).

remainder of this Essay I will offer four other points, designed to appeal particularly to conservatives.

First, the legal norms that would apply in resolving disputed questions of law are much thicker in the universe of precedent than they are in the world of originalism. The Constitution itself is notoriously cryptic. It must be supplemented with some other source of law. At this stage in our legal evolution, precedent provides more law to draw upon in supplementing the language of the Constitution than do originalist sources.

Consider the question whether Congress could ban advertisements for pharmaceutical drugs in newspapers and magazines. The originalist answer would be extremely indeterminate, because there is virtually nothing in the original materials that speaks to the matter. If we turn to Supreme Court case law, there is still some room for argument, but the norms are much thicker, and the likelihood that the answer is one on which people could reach consensus is much greater.

Another point is accessibility. In order for law to have an impact on behavior, it must be accessible to legal actors other than Supreme Court Justices. The precedents of the Supreme Court are published in the United States Reports and similar volumes. They are online; they have been indexed; they are easily searchable; every lawyer and judge in the country can readily get her or his hands on them. The materials that bear on original understanding are vast, often inaccessible, and in some cases only now being discovered. People frequently find new documents that might bear on original understanding. As a result, it is much harder for us to get our hands on those materials. It follows that a world in which the Constitution was interpreted using originalist sources rather than precedent would be one in which the behavior of legal actors would be less constrained by law.

Third, as Professor Strauss suggested, the style of reasoning from precedent is much more compatible with the skill set of the typical American lawyer or judge than is reasoning from original materials.<sup>11</sup> This reason is contingent on the nature of the legal system; if we had different judges or if we taught them differently in law schools, they might become more competent at reasoning from such materials. The reality, however, is that lawyers and judges are much more comfortable dealing with precedent. It follows that decisions reached by following precedent are

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11. See Strauss, *supra* note 2, at 970–71.

more likely to be comprehended and predicted than decisions reached using original materials would be.

The last point is, again, a kind of contingent, pragmatic point relating to the method by which judges and Justices are picked in this country. Many lawyers and legal scholars would like to see a process by which judges are selected because of their legal knowledge, legal skills, and judicial temperament, not because of their ideology or particular political beliefs. Which style of constitutional reasoning over time is more likely to push us to a system in which we pick judges based on their competence and their legal abilities, and which is more likely to produce tempestuous proceedings in which we pick people based on ideological considerations?

Here, I think the key variable is the capacity of different legal methods to produce change in the law. If the Court were to commit to a strong theory of precedent in constitutional law, it would reduce the prospects for change through constitutional interpretation. A strong theory of precedent would lock in some decisions that conservatives do not like. It would also lock in some decisions that they do like. Nonetheless, its greatest impact would be to make the Court a less attractive forum for achieving social policy outcomes through litigation. Consequently, the interest groups that are trying to get their various positions advanced through the courts would decide that the courts are not really the best hole in which to go fishing. They would decide that maybe they should try to get some laws passed by legislatures or get their policy preferences adopted by amending the Constitution.

A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy. This in turn would put a premium on legal knowledge and skills, rather than political preferences, in selecting future judges and Justices. The prospect of such a reorientation is reason enough to endorse the strong theory of precedent in constitutional law.



## RESISTING THE RATCHET

STEPHEN J. MARKMAN\*

Descending for a moment from the rarefied atmosphere of our panel's discussion of the United States Supreme Court, I would like to offer several perspectives on the role of precedent from my vantage point as a Justice of the Michigan Supreme Court for the past nine years. What may render this perspective of some interest in the present venue is that a majority of this court, four of its seven justices, are self-described "Federalists" and are committed to the judicial values that are often identified with the Federalist Society—in particular, a commitment to giving faithful meaning to the words of the law and to operating within the restraints of a constitution in which the separation of powers is fundamental. Moreover, ours is a court on which fine jurisprudential matters, such as the existence of an "absurd results" rule, the significance of legislative acquiescence as an interpretative tool, the virtues of the "last antecedent" rule, and uses and abuses of legislative history are routinely, and I believe thoughtfully, addressed at our conferences and in our opinions.

What in my experience most differentiates the Michigan Supreme Court from other state courts, including those routinely described as "conservative," "judicially restrained," or "strict constructionist," has been the court's treatment of precedent. Although respectful of precedent, as any judicial body must be, in the interests of stability and continuity of the law, the court has also been straightforward in its insistence that regard for precedent must be balanced with a commitment to interpreting the words of the law in accordance with their meaning.<sup>1</sup> That is, what most distinguishes the Michigan Supreme Court from other even conservative state courts of last resort has been its unwillingness to institutionalize the precedents of earlier jus-

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\* Justice, Michigan Supreme Court.

1. *See, e.g., Rowland v. Washtenaw County Rd. Comm'n*, 477 Mich. 197, 223–47; 731 N.W.2d 41, 57–66 (Mich. 2007) (Markman, J., concurring) (identifying and assessing decisions since 1999 in which the "Federalist" majority on the Michigan Supreme Court had reversed precedents).

tices who, like Justice William Douglas on the United States Supreme Court, expressed their preference "to make, rather than to follow precedent."<sup>2</sup> We have resisted becoming a participant in such a ratcheting process, by which periods of punctuated equilibrium periodically occur in which the law lurches in the direction favored by Justice Douglas and his philosophical allies, during which new precedents arise bearing little more than a random relationship to the written law, only to be followed by periods of conservative judicial rule in which these new precedents are affirmed in the interests of *stare decisis* and become a permanent fixture of the law.

Instead, the Michigan Supreme Court has set as its priority the proper exercise of the "judicial power," to read the law evenhandedly and give it meaning by assessing its words, its grammar and syntax, its context, and its legislative purpose. The court's dominant premise has been on "getting the law right"—moving toward the best and most faithful interpretations of the law—rather than in reflexively acquiescing in prior case law that essentially reflected little more than the personal preferences of predecessor justices.

The perspective of the court in addressing questions of constitutional, statutory, and contractual interpretation has been that, in exercising the "judicial power" of Michigan, it is our primary responsibility to say what the law "is," not what it "ought" to be. This responsibility derives from *Marbury v. Madison*,<sup>3</sup> from the Preambles to the United States and Michigan Constitutions, which direct us that it is "this" Constitution to which "we the people" have assented, from our "oath of office" in support of "this" Constitution, and from the inferences drawn from Article V, the amending provision of the Constitution. This primary responsibility also derives from our sense of constitutionalism—that to exceed this limited authority is necessarily to trespass upon the authority of the executive and legislative branches of government. Moreover, there is no alternative rule of interpretation, of giving meaning to the law, that both *precedes the decision* and better communicates that the decision is something more than a function of a judge's own personal predilections. After the fact, any modestly innovative and creative judge can

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2. See William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

3. 5 U.S. (1 Cranch) 137, 177 (1803).

justify almost any outcome by the application of assorted rules and maxims. But, unless judges are prepared to announce these rules in advance and apply them in a *consistent* fashion, it is something other than the rule of law that they are administering.

Also underlying this view of the judicial role is the sense that a more genuine long-term stability and continuity in the law—the very rationales for respecting precedent—are best achieved when the law means what it says, rather than merely what Justice Doe imagined it to say fifteen years ago; when “up” means “up,” not “down”; when “public use” means “public use,” not “public purpose”;<sup>4</sup> when the interpretations of the law increasingly converge with its actual language.

As the meaning of the law comes to track what the lawmaker has actually written—as the “judicial power” is exercised to elevate the product of the lawmaker rather than that of the judge—it seems to me that the law also becomes increasingly accessible to “we the people,” and less exclusively the domain of lawyers and judges. When, to use a mundane illustration, the law requires that a person must file a certain type of lien within “thirty days,” and when “thirty days” means thirty days, that law remains relatively accessible to the ordinary citizen. He or she can read the law and more or less understand their rights and responsibilities under this law. When, on the other hand, “thirty days” means “thirty-one days” if there has been an intervening holiday, “thirty-two days” if your car has broken down on your way to the registration office, “thirty-three days” if you have been in the hospital, and “thirty-four days” if you are a particularly sympathetic character, then the only way to understand this law and its various unwritten exceptions is to consult an attorney. That is, to read the law consistently with its language, rather than with its judicial gloss, is not to be “harsh” or “crabbed” or “Dickensian,” but is to give the people at least a fighting chance to comprehend the rules by which they are governed.

Restoring discipline to the law of a state that in many instances had become a patchwork of judicial decisions lacking any discernible consistency, often marked by multiple and inconsistent precedents on a single matter of law, essentially allowing judges to pick from precedent A or precedent B in the manner of a Chinese restaurant menu, can have dislocations. Although I believe

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4. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

that such dislocations are more fairly attributable to the court twenty years ago that said that "up" means "down," rather than to the court today that corrects this and says that "up" means "up," the reality is that the later court must recognize that the law cannot always move from flawed to ideal in one fell swoop, that sometimes it must first move to less flawed and less imperfect.

But getting the law "right" must necessarily be balanced with considerations of precedent. For, just as it seems to me the "liberal" judicial temptation is to do "justice," rather than "justice under law," the "conservative" judicial temptation, one that sometimes must be resisted, is to define perfectly that law. I say this not to denigrate that position, because it is one to which I myself generally subscribe. But the Michigan Supreme Court, properly I believe, has recognized that there are considerations that occasionally argue in favor of adherence to precedent, even when that precedent is wrong. These include the venerability of a precedent, the extent to which a precedent has become institutionalized or embedded within the law, and the recognition of *bona fide* reliance interests, such as where one class of persons has been encouraged by a precedent to purchase insurance against some hazard and another class of persons has not.<sup>5</sup>

Professor Calabresi raises legitimate concerns that the mere calculation of these and similar factors itself constitutes an essentially discretionary exercise of the judicial power, appearing in some ways to resemble the kind of balancing that is more properly a part of the legislative power.<sup>6</sup> I take this point seriously and do not have a fully satisfactory answer. I can only state, uncertainly, that in attempting to responsibly restore the law and the courts to their proper realm, the judiciary cannot be a force for turbulence or chaos. Although the law should never be moved by a court further from the design of the lawmaker, and a court should never stray further from its assigned role than its predecessors have already done, prudence and judgment must also be exercised. The more generations of judges that have concurred in a legal proposition, the more modest and cautious I believe I must be in discarding those propositions, and the more cognizance that I must give to the possibility that there has been

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5. See, e.g., *Robinson v. City of Detroit*, 613 N.W.2d 307 (Mich. 2000); *Pohutski v. City of Allen Park*, 641 N.W.2d 219 (Mich. 2002).

6. Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 958 (2008).

some genuine acquiescence on the part of the legislature and the people in that proposition. As Justice Frankfurter once said, respect for precedents sometimes reveals “the wisdom of [a] [c]ourt as an institution transcending the moment.”<sup>7</sup> Perhaps it is my conservative impulses coming to the fore.

Perhaps, more than anything else, it has been the Michigan Supreme Court’s attitudes toward precedent that have been the impetus for several multi-million dollar campaigns directed against the four “Federalist” justices. My court has been the subject of academic and popular studies focused upon our alleged lack of regard for precedent, we have been characterized as “judicial activists,” and we have been subject to extraordinary invective from our dissenting colleagues and the media. And, of course, we have been accused of being corrupt, partisan, and beholden to special interests. Most dastardly, we have even been accused of being members of a conspiratorial legal cabal known as the Federalist Society.

Yet, anyone who carefully reads our decisions would, I hope, find an intellectually vigorous court, an honest and conscientious tribunal, an even-handed and impartial body, struggling everyday to accord reasonable meaning to the law—whether that law be the Constitution of Michigan or of the United States, the enactments of the state legislature, the ordinances of Kalamazoo or Flint, or the contracts and deeds and bills of sale of our ten million citizens. We are attempting responsibly to bring to bear in our decision making in 250 cases each month the constitutional values that the Federalist Society has done so much to reinvigorate—the constitutional values that have given this nation the freest, the most prosperous, and the most stable republic in the history of the world.

Although there are many difficult issues that must be confronted by a court committed to a federalist jurisprudence, any such body that hopes to contribute seriously to the restoration of a legal culture that is in accord with traditional constitutional values must *first* confront the issue of how to reach an equilibrium between respect for text and respect for precedent. I suspect that the Michigan Supreme Court has not yet achieved a perfect solution in this regard, but, to its credit, I believe it has been thoughtfully engaged in this critical debate.

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7. *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).



*Federalist Society Symposium on Originalism*

**III.**

**THE ORIGINAL MEANING OF THE  
COMMERCE, SPENDING, AND  
NECESSARY AND PROPER CLAUSES**

*ESSAYISTS*

**MICHAEL STOKES PAULSEN**

**RANDY BARNETT**



# A GOVERNMENT OF ADEQUATE POWERS

MICHAEL STOKES PAULSEN\*

I am about to commit an act of unmitigated blasphemy for a Federalist Society member: I am about to attack most Federalist Society members' views of federalism.

So, first let me establish my credentials: I am most liberals' nightmare constitutional conservative. I am an original public meaning textualist. I believe that the single correct method of constitutional interpretation is to attempt faithfully to apply the meaning that the words would have had, in context, to a reasonably well-informed speaker or reader of the English language at or about the time the text was adopted. I believe further that this interpretive methodology is prescribed by the Constitution, which implicitly directs textualism as the way of interpreting the Constitution when it specifies that it is "this Constitution" that is adopted.<sup>1</sup> This is all set out in an elaborate article that I published with Vasan Kesavan in the *Georgetown Law Journal*, called "The Interpretive Force of the Constitution's Secret Drafting History."<sup>2</sup>

There is only one correct way to interpret the Constitution, and that is original public meaning textualism. Now, here comes the blasphemy: I believe that applying that interpretive methodology faithfully, one must conclude that the powers conferred on the national government are huge, sweeping, overlapping,

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\* Distinguished University Chair and Professor, University of St. Thomas, School of Law. This Essay is a slightly revised version of an extemporaneous presentation delivered to The Federalist Society National Lawyers' Division Convention on November 12, 2005. (At the time, I was McKnight Presidential Professor of Law and Public Policy at the University of Minnesota Law School.) My thanks to the attendees at that conference for their challenging questions and critical commentary, and to Steve Calabresi and David McGowan for insightful comments on earlier versions.

1. U.S. CONST. art. VI, cl. 2.

2. Vasan Kesavan & Michael S. Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003). For further elaboration of the textual case for textualism—and, specifically, original-public-meaning textualism, see Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. (forthcoming 2009).

and, when taken together, very nearly comprehensive. Alexander Hamilton was right. And nearly every member of the Federalist Society is wrong.

The Constitution's enumeration of powers, if pushed to its logical limits, in fact provides the national government with truly sweeping powers. The fact that, for many years, those limits were never reached or even pressed does not mean that the Constitution did not, in fact, confer broad powers on the national government. The fact that, politically, the full exercise of such powers might be unpopular or constitute bad public policy does not mean that the Constitution did not, in fact, confer such broad powers. The fact that the political virtues of federalism might be eroded or altered by the full exercise of the Constitution's enumerated national legislative powers does not mean that the Constitution did not, in fact, confer such broad powers.

Federalism, properly understood, is a descriptive term attached to the Constitution's allocation of powers. It is not a free-standing constitutional rule. There is no "Federalism Clause" in the Constitution. The Constitution's allocation of powers can result in many different practical arrangements, leaning more or less in favor of national predominance or state predominance in policymaking, depending on how the national government chooses to exercise its constitutional powers.

My proposition is simply this: the enumerated powers of the national government are huge powers. Although it is undoubtedly true that "[t]he enumeration presupposes something not enumerated,"<sup>3</sup> it is also true that the enumeration considered as a package fairly admits of a construction that permits the national government to act very nearly as if it were a government of general legislative power. The powers to tax, to spend, to regulate commerce, to wage war, to enforce prohibitions on state government actions abridging individual liberties, especially when combined with the sweeping power to enact laws that are necessary and proper for carrying those enumerated powers and any other powers of the national government into execution, create a national government of truly enormous constitutional powers.

There is very little that the federal government lacks constitutional power to do, if it employs its grants of powers carefully,

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3. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 74 (1824).

properly, ingeniously, and to full effect. Aside from the exceptions the Constitution creates in favor of individual rights, the primary limitation on the exercise of federal legislative power is the logical and political plausibility of the asserted relationship between the enacted policy and the constitutional powers on which it is asserted to rest.

Now, I know how deeply heretical this position is to my Federalist Society friends, and it probably means that I have forfeited (for the sixty-seventh time or so) my prospects of being appointed to the Supreme Court. Nonetheless, I am persuaded that this is the right answer. I emphasize that I do not necessarily *like* all of the political consequences to which this constitutional position might lead. But surely if the Federalist Society stands for anything, it stands for the proposition that one must never let one's political impulses drive one's constitutional interpretation. Along that route lies *Dred Scott*,<sup>4</sup> *Lochner*,<sup>5</sup> *Roe*,<sup>6</sup> *Casey*,<sup>7</sup> *Lawrence*,<sup>8</sup> and *McConnell v. FEC*,<sup>9</sup> among hundreds of other atrocities.

I offer here, as gently as I can, the admonition that the federalism-policy-driven, narrow reading of the Constitution's grant of specific and more general enumerated powers to the national government may be a milder version of the same disease that so grotesquely afflicts our liberal, anti-constitutionalist adversaries. That disease is the tendency to read the Constitution in accordance with our political preferences, rather than being guided by the objective original meaning of the words. It is a mistake to extract from the Constitution's grant of specific enumerated power a general abstract constitutional principle of federalism, and then to read that principle back into the specific enumerations as a rule of constitutional law that alters what otherwise would be the objective textual understanding of the grants of powers that the document actually gives. It is a mistake of the same type (but perhaps not of the same severity) committed by liberal activists, who extract from specific constitutional provi-

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4. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Roe v. Wade*, 410 U.S. 113 (1973).

7. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

8. *Lawrence v. Texas*, 539 U.S. 558 (2002).

9. *McConnell v. FEC*, 540 U.S. 93 (2003).

sions a general right of privacy or liberty, and then read that principle back into the Constitution, as if that is what it said.

In the rest of this Essay, I will present an outline of six points. The first point is an interpretive principle that frames everything else: Where a constitutional provision has a legitimate range of meaning—where there is ambiguity or open-endedness—and the legislature has acted pursuant to a view fairly within that range, a court may not properly invalidate what the legislature has done. I think this principle flows absolutely clearly from the very justification for judicial review set forth in *Federalist No. 78*<sup>10</sup> and in *Marbury v. Madison*.<sup>11</sup> That justification, in a nutshell, is this: The Constitution is law, and it is supreme law. Thus, where the Constitution supplies a rule of law and a legislative act is contrary to, or inconsistent with, that rule of law, the duty of the court is to apply the rules supplied by the Constitution, not the rules supplied by the unconstitutional statute.<sup>12</sup>

Conversely, where the Constitution does *not* supply a rule of law, there is no justification for a court striking down an act of the legislature as being contrary to the Constitution. It is essential, then—it is part of the core justification of judicial review—that the court conclude that the legislative act violates a rule of law that is set forth by the text of the Constitution before it strikes down the act.

Now, I believe in what friends of mine call “naïve right-answerism.” I believe that original meaning textualism yields single, correct answers to legal questions—at least sometimes. Sometimes that single right answer is a determinate point. Sometimes the right answer to a constitutional question is that

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10. THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“If there should happen to be an irreconcilable variance between the two [i.e., the Constitution and a legislative act], that which has the superior obligation and validity ought of course to be preferred . . . [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former.”).

11. 5 U.S. (1 Cranch) 137, 178 (1803) (“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.”).

12. For discussion of this straightforward position and its sometimes radical implications for much of our current constitutional practice, see Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

a text legitimately bears a range of meaning, a number of possible applications, and it is hard to privilege one over another. In other words, sometimes you run this interpretive program and you get answer A. Sometimes you run this program and you say, "You know what? The correct reading of the text is that it could embrace A, B, C, or D." My proposition is that where the text yields "A, B, C, or D," it is not legitimate for the judiciary to choose A and impose that as if it is the single, correct answer. Where it yields A, B, C, or D, and the legislature has acted pursuant to option A or option C, it is the duty of the courts to accept that legislative action. The power of constitutional construction within the boundaries of a general text is for Congress, not the courts. A corollary is that the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted.

Once you have adopted this interpretive proposition, all that remains is to recognize that the Constitution's most important grants of enumerated powers are written in broad and sometimes downright sweeping terms that bear a fairly substantial range of meaning.

My position is that, where the legislature has acted pursuant to a meaning that is within the fair range of a general text, the legislature's decision must be upheld. Note that this is not a rule of deference to the legislature in the sense of deliberately abstaining from ruling in accordance with what you think is the right answer to the constitutional question. Mine is *not* some notion that we should enforce the Constitution incorrectly. I think that, almost always, that sort of deference is illegitimate. Rather, what I am saying is that the *right* answer is that textual imprecision or generality often admits of a range of choices, and that the right answer is that the legislature must be permitted to choose from options within that range.

The classic case of a broadly-worded, open-textured provision, and probably the perfect illustration of this proposition, is the Necessary and Proper Clause. The Clause is fairly capable of a very broad range of meanings. Congress is granted the power to pass all laws which are "necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers" of the government.<sup>13</sup> If Alexander Hamilton and James Madison were right in their description of the inevitable linguistic implications of this clause in *The Federalist Nos. 23*,<sup>14</sup> 33,<sup>15</sup> and 44<sup>16</sup>—and they were—and if Chief Justice John Marshall was right in following this line of reasoning, and plagiarizing Hamilton, in *McCulloch v. Maryland*<sup>17</sup>—and he was—then Article I, Section 8, Clause 18 is truly the Big Lebowski of the Constitution. The Anti-Federalists were right in seeing in this clause the route to a national government of enormous powers.

*The Federalist Papers* soft-pedaled the argument a little bit—but not all that much. Madison and Hamilton did not really deny the breadth of what the Anti-Federalists referred to, disparagingly, as “the sweeping clause.”<sup>18</sup> Rather, the *Federalist Papers* argued that the power granted by the Necessary and Proper Clause was an inevitable corollary of principles that one would have inferred from the structure of the Constitution anyway.<sup>19</sup> But the Framers did not leave the matter to structural inference. They wrote the principle into the Constitution in express terms. And as Madison and Hamilton explained, the Necessary and Proper Clause is indeed a sweeping power to enact laws that, within Congress’s reasonable judgment, are needed and appropriate for carrying into effect all the other powers of the national government.<sup>20</sup>

Now, I think that in so-called Commerce Clause cases it is usually the Necessary and Proper Clause that is doing most of

13. U.S. CONST. art. 1, § 8, cl. 18.

14. THE FEDERALIST NO. 23 (Alexander Hamilton).

15. THE FEDERALIST NO. 33 (Alexander Hamilton).

16. THE FEDERALIST NO. 44 (James Madison).

17. 17 U.S. (4 Wheat.) 316, 421 (1819).

18. E.g., THE FEDERALIST NO. 33, at 198–99 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“And it is expressly to execute these powers that the *sweeping clause*, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws.”).

19. E.g., THE FEDERALIST NO. 33, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“[T]he constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated . . . . They are only declaratory of a truth which would have resulted by necessary and unavoidable implication . . . .”); THE FEDERALIST NO. 44, at 253 (James Madison) (Clinton Rossiter ed., 1999) (“Had the Constitution been silent on this head [i.e., the power granted through the Necessary and Proper Clause], there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.”).

20. E.g., THE FEDERALIST NO. 33, at 199 (Alexander Hamilton).

the work in the controversial instances. But the commerce power itself is a broad power. Congress may do anything that literally regulates interstate commerce, traffic, or "intercourse."<sup>21</sup> It is irrelevant that the regulation of the articles or goods or means or instrumentalities of interstate commerce is for a noncommercial purpose. The purpose to which the commerce power is employed is not relevant to the scope of the power to do whatever falls within its terms. The power is plenary within the bounds of actual regulation of commerce.

The Necessary and Proper Clause is the true source of the principle that Congress may regulate intrastate activity that has a substantial effect on interstate commerce, or that is otherwise needful and requisite to a regulatory scheme that, in fact, attempts to regulate interstate commerce or to prohibit interstate commerce. This is the position of Justice Scalia in *Raich*.<sup>22</sup> It was the position of the Court in *United States v. Darby*.<sup>23</sup> And I believe it is correct. A corollary of this is that Congress is, in substantial measure, the judge of what intrastate regulation is needed to accomplish the object of a legitimate interstate commerce regulation or prohibition.

This is a great and fearsome power, and it can be abused. At some point, the mind rebels; we all have our squeal points. And where it would require a court to pile inference upon inference in an essentially implausible way, the court might rightly conclude that it is unconstitutional for Congress to do what it has done. I tend to think, for that reason, that *Lopez*<sup>24</sup> and *Morrison*<sup>25</sup> were correctly decided, establishing limits on the plausibility of an extreme Necessary and Proper Clause rationale.

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21. An interesting example of this latter understanding is supplied by the Mann Act, 8 U.S.C. § 1557 (2000).

22. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.")

23. 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.")

24. *United States v. Lopez*, 514 U.S. 549 (1995).

25. *United States v. Morrison*, 529 U.S. 598 (2000).

Even where the federal government cannot accomplish some end through the vehicle of the commerce power, it usually can accomplish that end through some other vehicle. There is, as the saying goes, more than one way to skin a cat.

Consider the taxing power. The taxing power entails a power to regulate. The power to tax is the power to destroy.<sup>26</sup> And the federal government has the power to tax. Indeed, Hamilton considered the taxing power to be the most important of the enumerated powers of Congress,<sup>27</sup> and it is absolutely clear from the text and history that the taxing power may be employed for regulatory purposes essentially unrelated to the collection of revenue, as long as a measure really does operate as a tax.

For example, the taxing power extends to duties and excises.<sup>28</sup> And it is plain that one of the reasons for this empowerment was to permit the new national legislature to be protectionist, in order to advance a policy of promoting the development of domestic industries. That is a policy unrelated to the raising of revenue, and it can be accomplished by imposing a tax. The taxing power, then, is a freestanding power. The power to tax is plenary, limited only by the uniformity clause proviso that immediately follows it. The *Child Labor Tax Case*<sup>29</sup> was, therefore, wrongly decided.

Consider next the spending power. The federal government has the power to spend. Just as the power to tax is the power to destroy, the power to spend—to confer or withhold a benefit—is the power to coerce, or to destroy. In fact, that is a paraphrase of language from *United States v. Butler*.<sup>30</sup> Once again, Alexander

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26. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

27. See, e.g., THE FEDERALIST NO. 12, at 90–91 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“What will be the consequence, if we are not able to avail ourselves of the [power to tax] in its full extent? A nation cannot long exist without revenues . . . Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land.”).

28. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .”).

29. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

30. 297 U.S. 1, 70–71 (1936) (“If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? . . . The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree

Hamilton was right. The power to spend is a freestanding power of government that is not limited by the other specific power grants of Article I. It is its own separate power, and may be employed to produce results that might not be attainable under powers to regulate. A power to spend is different from a power to regulate. You may spend money even for unenumerated purposes.

Hamilton was right, but he might have been right for the wrong reason. He located the power to spend in the Taxing Clause of the Constitution.<sup>31</sup> If you read it carefully, you cannot possibly make the same error that Seth Waxman made in referring to this clause as the Spending Clause.<sup>32</sup> There is no Spending Clause, as such, in the Constitution; there is only a power to tax. We have already talked about the scope of the taxing power. But, actually, there is a spending power in the Constitution. It is just located elsewhere.

Ironically, it is located in Article IV, Section 3, Clause 2, which is often known as the Property Clause. That clause says that the "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The spending of money is the disposing of and the making of rules with regard to the dispensation of property of the United States, however derived. Such property could be derived from exercise of the taxing power, or it could be property obtained through some other means. But look at what the Clause says. If this provision is, as Professor David Engdahl has convincingly argued, the source of the spending power,<sup>33</sup> it is a plenary power of the federal government to spend and to make all needful rules for

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to the proposed regulation. *The power to confer or withhold unlimited benefits is the power to coerce or destroy.*" (emphasis added)).

31. U.S. CONST. art. I, § 8, cl. 1.

32. Transcript of Oral Argument at 14, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) ("Justice O'Connor, we did the best we could in our supplemental brief to explain the operation of this provision of the Department of Transportation Appropriations Act. One of the unusual things about it is that it includes a provision that if States don't comply they will not lose any funding, *although it does also purport to apply Congress's Spending Clause authority* to the Driver's Privacy Protection Act." (emphasis added)). In my original presentation, I was referring to Mr. Waxman's remarks as a member of the same panel discussion. I am grateful to the editors of the *Harvard Journal of Law & Public Policy* for finding this real-life illustration of customary, but misleading, usage.

33. See David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1994).

disposing of the federal government's property, however obtained. But it is *only* a power to spend. It is not also a power to directly regulate. The exercise of the spending power, therefore, does not preempt inconsistent state law. States (or individuals or entities) may refuse the money. They may preserve their inconsistent policy by declining the money in the first place.

But one might ask, can the spending power not be used as a *de facto* power to coerce, induce, bribe, and extort, even if it is not a power to legally require? The answer is *yes*. The only limitation on what the federal government may spend money for, and the conditions it may attach, is that the condition itself not be *independently* unconstitutional. Now this is the most heretical thing I have said so far: The flaw in *South Dakota v. Dole*<sup>34</sup> is not that it recognizes too broad a federal government spending power, but that it recognizes too *narrow* a federal government spending power.<sup>35</sup> The correct view is that the government of the United States may spend money for any purpose for which it has money to spend, and that it may attach whatever conditions it wants—"germane" or not—to acceptance of such money, so long as the conditions are not independently unconstitutional.<sup>36</sup>

I turn now to an undervalued source of federal legislative power: the war power. One of the best ways to understand the different views of the Founding generation with respect to national governmental power is to look at who actually fought in the Revolutionary War. Both Washington and Hamilton ended up with strongly nationalist views. So did John Marshall. Jefferson did not serve in the Continental Army, and had a far narrower, state-centric view of sovereignty and national legis-

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34. 483 U.S. 203 (1987).

35. *Id.* at 207–08 (restricting congressional spending power by requiring that the spending power be exercised (1) only "in the pursuit of the general welfare"; (2) "unambiguously," in relation to "the federal interest in particular national projects or programs"; and (3) in accord with "other constitutional provisions" (internal citations and quotation marks omitted)).

36. South Dakota is not *constitutionally entitled* to its "fair share" of highway funds. Thus, there is nothing constitutionally wrong with the federal government's decision not to give South Dakota any federal highway funds if the federal government dislikes South Dakota, or its policies, for any reason. Similarly, universities have no constitutional entitlement to federal grants or loans. Thus, there is nothing constitutionally wrong with the federal government's decision not to give money to universities that exclude federal military recruiters. *Cf. Rumsfeld v. Forum for Academic Institutional Rights*, 547 U.S. 47 (2006) (rejecting a First Amendment objection to such a funding condition).

lative power. But let us consider what the war power adds to the foregoing analysis.

Remember that Congress has the necessary and proper power to carry into execution its powers to declare war and to raise and support armies, and the President's power as Commander-in-Chief and duty to preserve, protect, and defend the nation. The Supreme Court has said that the power to wage war is the power to wage it successfully—the power to win.<sup>37</sup> It is the power to marshal the nation's resources to the war effort and to protect the nation and its citizens from attack. I believe that Congress has the power to pass all laws necessary and proper for carrying into execution the power of our government to win wars and protect its people. The war power of the national government is a fearful, terrible, vital, enormous, encompassing power. This has broad implications.

When I teach *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>38</sup> I always point out the line of this opinion that says, well, the President cannot do this on his own, but Congress could, pursuant to the commerce power.<sup>39</sup> There is a simpler, more direct answer. If there is a war, Congress clearly has the power—a dangerous power to be sure—to nationalize industries, to seize steel mills, if necessary, to effectuate the war that is being waged.

A related point seeks to connect the *Lopez* case to the tragedy in Beslan. Beslan, I hope we have not forgotten, is the city in Russia where there was a siege at an elementary school. Something similar could happen in the United States. My proposition is that the Gun-Free School Zones Act<sup>40</sup> could legitimately be adopted by the federal government as a national security defense measure. Congress could determine that prohibiting or deterring or tracking or punishing the possession of violent weapons in school zones is a power that the federal govern-

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37. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("The war power of the national government is the power to wage war successfully." (citation and internal quotation marks omitted)). There is much that is wrong in the Court's unanimous opinion in *Hirabayashi*, but this proposition is unexceptionable.

38. 343 U.S. 579 (1952).

39. *See id.* at 588 ("The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy.").

40. 18 U.S.C. § 922(q) (2000) (originally enacted as Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844).

ment, if it chooses, needs to exercise in order to provide for the defense of its citizens during a time of war and terrorism.<sup>41</sup>

There is more yet: The Civil War Amendments' enforcement clauses<sup>42</sup> are most naturally read as new, sweeping "necessary and proper" clauses. They grant Congress broad power to pass "appropriate" legislation to enforce some pretty broadly-worded, generally-expressed limitations on state government power. If one were to apply—as one probably should—the then-prevalent, *McCulloch*-driven broad understanding of Congress's powers under the Necessary and Proper Clause to these linguistically similar provisions ("proper" / "appropriate"), one ends up with a truly sweeping assignment of new legislative power to the national government.<sup>43</sup>

These provisions give Congress "necessary and proper" power with respect to vast new areas of federal governmental authority: protection against private coercive action eviscerating persons' physical or economic liberty;<sup>44</sup> protection from private violence tolerated by state authorities;<sup>45</sup> protection of individual civil rights against government;<sup>46</sup> protection against or redress from state action denying or failing to provide equal protection of the laws or due process of law;<sup>47</sup> and enforcement of the right to vote without discrimination on the basis of race.<sup>48</sup> When read in light of their enforcement clauses, these amendments constitute dramatic additions to the menu of Congress's enumerated powers—additions in many ways broader and

41. Note that this does not answer the question whether the Second Amendment limits the exercise of this power.

42. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

43. For an excellent defense of this position on historical grounds, see Steven A. Engel, Note, *The Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

44. U.S. CONST. amend. XIII, § 1 (prohibiting slavery or involuntary servitude).

45. U.S. CONST. amend. XIV, § 1 (prohibiting state denial of equal protection of the laws).

46. U.S. CONST. amend. XIV, § 1 (prohibiting state abridgement of the privileges or immunities of national citizenship).

47. U.S. CONST. amend. XIV, § 1 (prohibiting state denial of equal protection or due process of law).

48. U.S. CONST. amend. XV, § 1 (prohibiting denial of the right to vote based on race or prior condition of servitude).

more encompassing than most of the power-grants of Article I, Section 8. In a sense, the Fourteenth Amendment is the enactment, in slightly less comprehensive terms, of Madison's earlier proposal, rejected at the framing, of a federal congressional veto over state laws. Moreover, the very generality of the terms with which these state prohibitions/federal power-grants are expressed means that Congress possesses, as a practical matter, broad latitude to define more specifically what it is that it wishes to "enforce" with "appropriate" legislation.

This is not the Supreme Court's current understanding, of course. It considers Congress's powers to be mere adjuncts to the Court's own broad interpretive authority. Congress's powers are weak; the Court's are strong.<sup>49</sup> Both of these conclusions are probably wrong. The original meaning of the Amendments' texts suggests just the opposite of the Court's rule: Congress has sweeping authority in this area; the courts are the adjuncts.<sup>50</sup> Federalist Society members are likely to cheer the latter half of this proposition. But they ought not neglect the former: Congress has broad power to define and legislate rights against state governments that protect the privileges or immunities of national citizenship, provide for equal protection of the laws to all persons within a state, guarantee that states provide due process of law, and eradicate racial discrimination in voting. The power to enforce the broadly-worded prohibitions of the Civil War Amendments is a sweeping grant of national legislative power.<sup>51</sup>

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49 See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

50. I hope to develop this understanding in future writing. The core insight is that as a matter of text, structure, and history, the Fourteenth Amendment is primarily a text empowering Congress to legislate against state laws and practices. The broader one's understanding of the language of Section 1, the *less* one can say that it authorizes federal judicial invalidation of state action that fits within the range of meaning admitted by such broad language; but the *more* one can say that the grant of federal legislative power over such a broadly-described subject matter authorizes broad congressional choice in such matters. See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 252–53 n.10 (1995) (suggesting such an understanding of the Section 5 enforcement power); see also Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184–192 (1997); Engel, *supra* note 43.

51. See *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (noting that the text of the Fourteenth Amendment does not say that "the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged.").

My final point relates to the statements of a few liberal critics of original meaning textualism to the effect that originalism tends to produce for conservatives the results they like to see. Not always; I like some but not all of the policy implications of originalism. The consequence of my interpretive position, here, is that the federal government has a lot more power than I am comfortable with, as a matter of my political preferences as a conservative Republican. But although I would prefer that the federal government be a government of fewer powers, we go to war with the Constitution we have, not the one we prefer.

Aren't there *some* things the national government cannot do? Yes. It may not dictate the location of a state's capitol.<sup>52</sup> It may not directly require a state legislature to enact specified state legislation.<sup>53</sup> And I have my doubts about protecting hapless toads that never stray far from home.<sup>54</sup> The enumeration of powers presupposes something unenumerated.

But not very much.

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52. *Coyle v. Smith*, 221 U.S. 559 (1911).

53. *New York v. United States*, 505 U.S. 144 (1992).

54. *Compare* *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), with 334 F.3d 1153, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*). For a brilliant and entertaining analysis of this last type of issue, see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower Loving Fly*, 97 MICH. L. REV. 174 (1998).

# THE CHOICE BETWEEN MADISON AND FDR

RANDY BARNETT\*

This exchange is about three clauses that have often been used by the courts since the New Deal to expand federal power: the Commerce Clause, the Necessary and Proper Clause, and the Taxation Clause, from which the spending power has (at least until today) been construed. This Essay addresses the originalist interpretation of the Necessary and Proper Clause.

Now, because I have not studied the matter closely, I am not going to comment on the spending power. I have always been attracted, though, to Madison's view that there is no freestanding spending power, but only a power to spend what is necessary and properly incident to the enumerated powers. Madison did not believe that the spending power grew out of the taxation power, but instead that all exercises of the spending power had to be incident to the other enumerated powers.<sup>1</sup> I am not, however, going to make the argument for this position here.

Nor am I going to spend much time discussing the original meaning of the Commerce Clause. In my book, *Restoring the Lost Constitution*,<sup>2</sup> I identified every use of the word "commerce" in the Constitutional Convention, the ratification debates, and the Federalist Papers.<sup>3</sup> In a separate study, I examined the over 1,500 times the word "commerce" appeared in the *Philadelphia Gazette* between 1728 and 1800.<sup>4</sup> In all of these appearances of the word "commerce," I could not find one clear example where the term was used to apply more broadly than the meaning identified by

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1. See, e.g., THE FEDERALIST NO. 41, at 264–65 (James Madison) (Robert Scigliano ed., 2000) (rejecting the proposition that "the power 'to lay and collect taxes' . . . amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare").

2. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

3. See *id.* at 278–89.

4. See *id.* at 289–91.

Justice Thomas in his concurring opinion in *Lopez*,<sup>5</sup> in which he maintained that the word “commerce” refers to the trade and exchange of goods, along with the process of trading and exchanging, including transportation.<sup>6</sup>

The January 13, 1790 issue of the *Pennsylvania Gazette* included a representative use of the word “commerce” at the Founding:

Agriculture, manufacturers and commerce are acknowledged to be the three great sources of wealth in any state. By the first [agriculture] we are to understand not only tillage, but whatever regards the improvement of the earth; as the breeding of cattle, the raising of trees, plants and all vegetables that may contribute to the real use of man; the opening and working of mines, whether of metals, stones, or mineral drugs . . . . By the second [manufacturers], all the arts, manual and mechanic; . . . by the third [commerce], the whole extent of navigation with foreign countries.<sup>7</sup>

So this is how one source distinguished agriculture, manufacturing, and commerce; a very common trilogy that was repeatedly invoked.

For an originalist, direct evidence of the actual use of a word is the most important source of the word’s meaning. It is more important than referring to the “broader context.” Appealing to the “larger context” or the “underlying principles” of the text is the means by which some today are able to turn the words “black” into “white” and “up” into “down.”

Now, it may come as some surprise to you to learn that even the New Deal Supreme Court never formally broadened the meaning of the term “commerce” in any of its cases. Instead, it relied on an expanded interpretation of the Necessary and Proper Clause to enlarge the powers of the national government. The New Deal Supreme Court never redefined the word “commerce.” There is no case in which it said, “oh no, commerce means more today than it used to mean.” Instead the Court expanded the use of the Necessary and Proper Clause to

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5. *United States v. Lopez*, 514 U.S. 549 (1995).

6. *Id.* at 585 (Thomas, J., concurring) (“At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”).

7. BARNETT, *supra* note 2, at 274.

reach activity that it admitted was *not* commerce but which it was necessary and proper to reach anyway.<sup>8</sup>

Thus, this Essay focuses on the Necessary and Proper Clause. Now, unfortunately, because the Necessary and Proper Clause uses a term of art, you cannot find its original meaning by examining how the word “necessary” or the word “proper” was commonly used, the way you can when you are looking for a term like “commerce.” You really do need to examine the context in which this phrase was introduced into the Constitution, and how it was explained to the public when it was criticized by the Anti-Federalists as conveying the kind of sweeping and unlimited powers to Congress that Professor Michael Paulsen has claimed for it,<sup>9</sup> and that Justice Scalia described in his concurring opinion in *Raich*.<sup>10</sup>

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The Necessary and Proper Clause was added to the Constitution by the Committee of Detail without any previous discussion by the Constitutional Convention. Nor was it the subject of any debate from its initial proposal to the Convention’s final adoption of the Constitution. The likely reason why the Necessary and Proper Clause received no attention from the Convention became clear during the ratification convention debates, as did the Clause’s public meaning.

In the ratification debates, opponents of the Constitution pointed to this clause as evidence that the national government had virtually unlimited and undefined powers. In other words, the Anti-Federalists said, “Look, we object to this Constitution because it is going to lead to the very kind of powers that Professor Paulsen told you the federal government has.”<sup>11</sup> In the New

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8. See, e.g., *United States v. Wrightwood Dairy*, 315 U.S. 110, 121 (1942) (“We conclude that the national power to regulate the price of milk moving interstate . . . extends to such control over intrastate transactions . . . as is *necessary and appropriate* to make the regulations of the interstate commerce effective.” (emphasis added)).

9. See Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL’Y 991, 995–96 (2008).

10. See *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

11. See Paulsen, *supra* note 9, at 992–93.

York ratifying convention, for example, Anti-Federalist John Williams contended that “[i]t is perhaps utterly impossible fully to define this power.”<sup>12</sup> For this reason, “[w]hatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment.”<sup>13</sup>

Federalist supporters of the Constitution repeatedly denied the charge that all discretion over the scope of its own powers effectively resided in Congress. They insisted that the Necessary and Proper Clause was not an additional freestanding grant of power but merely made explicit what was already implicit in the grant of each enumerated power. As explained by George Nicholas in the Virginia ratifying convention, “the Constitution had enumerated all the powers which the general government should have, but did not say how they were to be exercised. It therefore, in this clause, tells how they shall be exercised.”<sup>14</sup> Like other Federalists, Nicholas denied that this clause gave “any new power [to Congress].”<sup>15</sup> “Suppose,” he reasoned,

it had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would this have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all.<sup>16</sup>

In short, “[the C]lause only enables [the Congress] to carry into execution the powers given to them. It gives them no additional power.”<sup>17</sup>

James Madison, in Virginia, added his voice to the chorus, when he said, “the sweeping clause . . . only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause.”<sup>18</sup> Also in Virginia, Edmund Pendleton, President of the

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12. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 331 (Jonathan Elliot ed., Ayer Co. Publishers 1987) (1836).

13. *Id.* at 338.

14. 3 DEBATES, *supra* note 12, at 245.

15. *Id.* at 245–46.

16. *Id.*

17. *Id.* at 246.

18. *Id.* at 455.

Convention, insisted that this clause did not go “a single step beyond the delegated powers.”<sup>19</sup> If Congress were

about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers.<sup>20</sup>

The same point was made in the North Carolina convention. In Pennsylvania, James Wilson explained that this clause “is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.”<sup>21</sup> And Thomas McKean insisted that “it gives to Congress no further powers than those already enumerated.”<sup>22</sup>

So here, then, is the likely explanation for the lack of debate surrounding the Clause at the Philadelphia Convention. If the power to make law was already thought to be implicit in the enumerated power scheme, it is not surprising that the Clause would provoke no discussion at the Convention. Unfortunately, most interpreters today, including many originalists, go no further in their investigation of the original meaning of the Necessary and Proper Clause than Chief Justice Marshall’s opinion in *McCulloch v. Maryland*,<sup>23</sup> written in 1819, some thirty years after the ratification of the Constitution.

In *McCulloch*, Marshall upheld the constitutionality of the Second National Bank of the United States.<sup>24</sup> The bill establishing the second Bank had been signed into law by President James Madison, a man who had, as a Representative in the First Congress, strongly objected to the constitutionality of the First National Bank on the ground that it exceeded the enumerated powers of Congress. Here is what Madison said in his speech to Congress:

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the contexts, be limited to the means *necessary* to the *end*, and *incident* to the *nature* of the specified powers.

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19. *Id.* at 441.

20. *Id.*

21. 2 DEBATES, *supra* note 12, at 468.

22. *Id.* at 537.

23. 17 U.S. (4 Wheat.) 316 (1819).

24. *Id.*

The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had been explained by the friends of the constitution, and ratified by the state conventions. The essential characteristics of the government, as composed of limited and enumerated powers, would be destroyed: If instead of direct and incidental means, any means could be used, which in the language of the preamble to the bill, 'might be conceived to be conducive to the successful conducting of the finances; or might be *conceived to tend to give facility* to the obtaining of loans.'<sup>25</sup>

He then went on to say:

Mark the reasoning on which the validity of the bill depends. To borrow money is made the *end* and the accumulation of capitals, *implied* as the *means*. The accumulation of capitals is then the *end*, and a bank *implied* as the *means*. The bank is then the *end*, and a charter of incorporation, a monopoly, capital punishments, &c. *implied* as the *means*. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.<sup>26</sup>

This was Representative Madison's reason for opposing the first Bank. Yet as President, decades later, he signed the bill approving the second Bank. Did this mean he had abandoned his earlier restrictive reading of "necessary and proper"?

Although Madison eventually came to be persuaded, by practice, that a national bank is incident enough to the enumerated powers to be constitutional, he nevertheless strongly objected to the opinion in *McCulloch*, in which Chief Justice Marshall famously equated the term "necessary" with mere convenience:

But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned.<sup>27</sup>

Madison both acknowledged the supposedly modern insight that the national economy is interconnected and rejected this in-

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25. JAMES MADISON, WRITINGS 484–85 (Jack N. Rakove ed., 1999).

26. *Id.* at 486.

27. *Id.* at 734.

terconnection as a basis for a latitudinarian interpretation of "necessary":

In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other. Ends & means may shift their character at the will & according to the ingenuity of the Legislative Body.<sup>28</sup>

He then concluded with his real objection: "Is there a Legislative power in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised as a means for carrying into effect some specified Power?"<sup>29</sup>

And it was not just Madison who was displeased with *McCulloch*. The popular outcry against *McCulloch* was so great that Chief Justice Marshall himself felt moved to defend his decision in an essay he published anonymously under the name "A Friend of the Constitution."<sup>30</sup> Imagine if former Chief Justice Rehnquist had been so vilified for a judicial opinion he had written that he published anonymous op-eds in the *Wall Street Journal* defending the opinion. But that is exactly what John Marshall did.

Here is a part of what Chief Justice Marshall said in defense of *McCulloch*, which shows that even he denied that *McCulloch* meant what it later came to be interpreted to mean:

In no single instance does the Court admit the unlimited power of congress to adopt any measure whatever, and thus to pass the limits prescribed by the constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court also expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."<sup>31</sup>

That is Chief Justice Marshall, not me, interpreting *McCulloch v. Maryland*.

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28. *Id.*

29. *Id.*

30. *Essays from the Alexandria Gazette: John Marshall, "A Friend of the Constitution,"* 21 STAN. L. REV. 456 (1969).

31. *Id.* at 478-79.

So, who was right? Madison or Marshall? In an article on the original meaning of the Necessary and Proper Clause,<sup>32</sup> I contended that the difference between Democratic-Republicans, such as Madison and Jefferson, and Federalists, such as Hamilton and Marshall, was far less significant than it appears today. On the one hand, both sides insisted that a law be “plainly adapted” to an enumerated power, or what we today call a degree of “means-ends fit.” On the other hand, both sides rejected the idea that “necessary” means “indispensably requisite,” the meaning urged upon the *McCulloch* Court by the State of Maryland and properly rejected by Chief Justice Marshall. Madison had much earlier rejected “indispensably requisite” as the proper interpretation of “necessary” on the ground that it would make federal governance nearly impossible.

The primary problem with reading *McCulloch* and other Marshall opinions, like *Gibbons v. Ogden*,<sup>33</sup> is seeing past the gloss placed on these decisions by defenders of the Supreme Court’s expansive interpretation of national powers to uphold President Roosevelt’s New Deal program. The loose reading of these Marshall Court opinions was advanced so the New Deal Court’s jurisprudence could be characterized as a “restoration” of original meaning, rather than the constitutional revolution that even most progressive scholars today would readily admit it was. The challenge for those who accept originalism is to distinguish between the Madisonian and the Rooseveltian interpretations of federal power, especially when the government invokes the Necessary and Proper Clause.

Consider the medical cannabis case of *Gonzalez v. Raich*,<sup>34</sup> which I argued in the Supreme Court. In his dissenting opinion, Justice Thomas adopted a Madisonian interpretation:

The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws which are absolutely indispensable to the exercise of an enumerated power.

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32. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. LAW 183 (2003).

33. 22 U.S. (9 Wheat.) 1 (1824).

34. 545 U.S. 1 (2005).

... To act under the Necessary and Proper Clause, then, Congress must select a means that is 'appropriate' and 'plainly adapted' to executing an enumerated power; and the means cannot be otherwise prohibited by the Constitution. The means cannot be inconsistent 'with the letter and spirit of the [C]onstitution.'<sup>35</sup>

....

In sum, neither in enacting the [Controlled Substance Act] nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the states in order to eliminate even the intrastate possession and use of marijuana.<sup>36</sup>

I think we all know that is exactly what Congress was trying to accomplish; it was not trying just to limit interstate commerce. It was trying to use its power over interstate commerce to exert a police power over purely local conduct of a sort that is reserved to the States. In short, the Congress is trying to override the inherent constraints on its powers that result from a federal system of government. As Justice Thomas wrote:

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper."

....

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, ... [it] may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.<sup>37</sup>

In *Raich*, Justice Thomas did not deny that the enumerated powers of Congress are supreme where they are inconsistent with the exercise of the state police power. Rather, he claimed that, under the Necessary and Proper Clause, it is an improper extension of those enumerated powers to *imply* other powers that

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35. *Id.* at 59–60.

36. *Id.* at 64 (Thomas, J., dissenting).

37. *Id.* at 64–65.

interfere with the fundamental principles of federalism and dual sovereignty. In *Raich*, the Court upheld an implied power to reach wholly intrastate, noneconomic activity even when it severely interfered with the police power of states to promote the health of its citizens (and also to regulate the practice of medicine).

Now, contrast Justice Thomas's dissent with Justice Scalia's concurring opinion in *Raich*, in which he adopted a Rooseveltian interpretation of the Necessary and Proper Clause:

*Lopez* and *Morrison* affirm that Congress may not regulate "purely local" activities within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation . . . . To dismiss this distinction as "superficial and formalistic" is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.<sup>38</sup>

What renders Justice Scalia's interpretation of the Necessary and Proper Clause "Rooseveltian" is his extreme deference to the decision of Congress as to whether it really is essential to a larger regulatory scheme for the legislation it passes to reach wholly intrastate, noneconomic activities that, traditionally, have been included within the police power of individual states. Like Madison, the dissenters in *Raich* required some showing of a means-ends fit. Like the New Deal Court, Justice Scalia left the question of means-ends fit entirely up to Congress. And also like the New Deal Court, he denied that this interference with the traditional police powers of states is an improper construction of implied federal power.

\* \* \*

The remarkably successful coalition that is the Federalist Society stands today at a crossroad. In one direction is a continuing Madisonian commitment to originalism, according to which the powers of the national government are limited, and these textual limits are enforceable by courts. Just as the courts are restrained from changing the meaning of the Constitution, so too is Congress.

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38. *Id.* at 38–39 (Scalia, J., concurring in the judgment) (citations omitted).

In the other direction is a Rooseveltian commitment to judicial restraint *above all else*, a restraint that is justified by distorting original meaning, by creating some insurmountable burden of proof before legislation can be overturned, or by claiming that it is too late to revisit New Deal era "super-precedents."<sup>39</sup> Take your pick. Perhaps a jurisprudence of complete and total judicial restraint, paired with unlimited national power, provides a better world than a jurisprudence of a written constitution with limited and enumerated national powers. But if that is the road that the members of the Federalist Society choose to take, then I suggest we change the silhouette in our banner from that of James Madison to that of FDR.

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39. See Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super-Precedent: A Reply to Farber and Gerhard*, 90 MINN. L. REV. 1232 (2006).



# PAPER MONEY AND THE ORIGINAL UNDERSTANDING OF THE COINAGE CLAUSE

ROBERT G. NATELSON\*

*"The Congress shall have Power . . . To coin Money, regulate the  
Value thereof, and of foreign Coin . . ."*

– Constitution of the United States<sup>1</sup>

*"Poor? Look upon his face. What call you rich?  
Let them coin his nose, let them coin his cheeks."*

– William Shakespeare<sup>2</sup>

*Over a century ago, the Supreme Court decided the Legal Tender Cases, holding that Congress could authorize legal tender paper money in addition to metallic coin. In recent years, some commentators have argued that this holding was incorrect as a matter of original understanding or original meaning, but that any other holding would be absolutely inconsistent with modern needs. They further argue that the impracticality of functioning without paper money demonstrates that originalism is not a workable method of constitutional interpretation.*

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\* Professor of Law, The University of Montana School of Law. Researching this Article required extensive use of Founding-era legal sources not customarily consulted by American legal scholars. I am particularly grateful to many helpful and intelligent librarians. These include the staff and administration of the Bodleian Law Library, University of Oxford; Dr. Norma Aubertin-Potter, Chief Librarian of the Codrington Library at All Souls College, University of Oxford; Dr. Vanessa Hayward, Keeper of the Middle Temple Library, London, and her staff; Ms. Virginia Dunn and the Archives Research Services staff at the Library of Virginia, Richmond; and Professor Stacey Gordon, Phil Cousineau, and Bob Peck, all at the Jameson Law Library at The University of Montana.

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All translations from Latin to English in this Article are mine. A bibliographical footnote is at the end of the Article.

1. U.S. CONST. art. I, § 8, cl. 5.

2. WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 3.

*Those who rely on the Legal Tender Cases to discredit originalism are, however, in error. This Article shows that the holding, although not all the reasoning, of those cases was fully consistent with the original understanding of the Coinage Clause. This Article tells the intriguing story of Colonial America's extraordinary monetary innovations, examines contemporaneous law and language, and shows how the paper money question was addressed during the framing and ratification of the Constitution.*

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## INTRODUCTION

In the latter half of the nineteenth century, the Supreme Court decided a series of cases that upheld the power of Congress to issue paper money and to make it legal tender for all debts.<sup>3</sup> Although the last of these cases was decided in 1884,<sup>4</sup> several constituencies have kept the issues decided in those cases alive. One of these constituencies is a small, but vocal, group that has never been reconciled to the idea of American paper currency. They maintain that the Constitution did not authorize paper money and that the United States, as a matter of constitutional fidelity and sound policy, should return to a monetary regime centered on the coinage of precious metal.<sup>5</sup> More influential,

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3. When used narrowly, the expression "the *Legal Tender Cases*" refers only to *Knox v. Lee* and *Parker v. Davis*, *infra*. In this Article, however, the term refers to the entire string of connected decisions. In chronological order, they are as follows: *Veazie Bank v. Fenno*, 75 U.S. 533, 548 (1869) (sustaining the power of Congress to issue paper money, relying primarily on longstanding practice, but reserving the question whether Congress could make such paper legal tender); *Hepburn v. Griswold*, 75 U.S. 603 (1869) (The Court held, 5-3, that it was not within Congress's power to make paper money legal tender for a debt that had arisen before the legal tender law. The Court held that the legal tender law was not authorized by the Coinage Clause, not incidental to the debt and war powers because neither necessary nor appropriate to carry out those powers, violated the spirit of the Constitution, and, through a kind of substantive due process, violated the Fifth Amendment Due Process Clause. The dissent argued primarily that the measure was necessary, and dismissed the substantive due process argument on the ground that it could lead to invalidation of almost any sort of regulation.); *Knox v. Lee* and *Parker v. Davis*, 79 U.S. (12 Wall.) 457 (1871) (companion cases that together are known as the *Legal Tender Cases*) (overruling *Hepburn* and holding, 5-4, that Congress could make Civil War paper money legal tender for debts arising both before and after the legal tender enactment); *Dooley v. Smith*, 80 U.S. 604 (1871) (upholding, 6-3, a tender law covering paper money, relying on the *Legal Tender Cases*); *Railroad Co. v. Johnson*, 82 U.S. 195 (1872) (upholding a legal tender law, 6-3); *Maryland v. Railroad Co.*, 89 U.S. 105 (1874) (holding, 7-2, that to sustain a contractual requirement that a debt be paid only in gold there must be a specific term in the contract to that effect); *Juilliard v. Greenman*, 110 U.S. 421 (1884) (holding, 8-1, that Congress had authority to enact peacetime tender law covering reissued greenbacks).

Decades later, the Court decided *Norman v. Baltimore & Ohio Railroad Co.* and *United States v. Bankers Trust Co.*, collectively called the *Gold Clause Cases*, 294 U.S. 240 (1935) (upholding, 5-4, Congress's power to invalidate retroactively gold clauses in private contracts). This Article does not examine whether the holding of the *Gold Clause Cases* was consistent with the original understanding.

4. *Juilliard*, 110 U.S. at 421.

5. *See, e.g.*, Solomon, *infra* note 344:

Consistent with the hostility felt towards paper money at the time of the Constitutional Convention, the Framers defined "Money" of the United States as coin alone. The authority in the U.S. Constitution "[t]o coin Money," lifted from the Articles of Confederation, represents the lone

perhaps, have been legal commentators who agree that the *Legal Tender Cases* were wrongly decided from an originalist point of view, but who do not advocate a return to metal coinage.<sup>6</sup> Some, such as the late Professor James Willard Hurst, employ the *Legal Tender Cases* to argue that pure originalism is not a workable method of constitutional interpretation.<sup>7</sup> They contend that courts sometimes must decide constitutional cases according to current exigencies<sup>8</sup> or current values,<sup>9</sup> rather than

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constitutional grant of power to create "Money" and limits specifically the means of generation to "coin[ing]."

While the U.S. Constitution prohibits the states from issuing paper currency by barring them from "emit[ting] bills of credit," it is silent on whether the federal government may issue such bills. Distrusting paper money, the Constitutional Convention deliberately struck a provision from the initial draft of the U.S. Constitution empowering the federal government to emit bills of credit.

*Id.* at 81 (citations omitted); see also Edwin Vieira, Jr., *The Forgotten Role of the Constitution in Monetary Law*, 2 TEX. REV. L. & POL. 77, 116–17 (1997) (implying that the Constitution authorizes only metal coinage). The claim that paper money is not constitutional is raised in litigation from time to time. See Pai, *infra* note 344, at 535 n.2 (listing cases).

The existence of this view among some on the right side of the political spectrum drew a response in Mark Edward DeForrest & James M. Vaché, *Truth or Consequences Part Two: More Jurisprudential Errors of the Militant Far-Right*, 35 GONZ. L. REV. 319, 333–38 (1999–2000) (arguing against the view that money must be metallic to be constitutional).

6. See, e.g., Dam, *infra* note 344, at 389 ("[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money]."); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1398 n.358 (2001) ("It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 475 (2006) ("There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money."). But see, e.g., C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?* 24 CAL. W. L. REV. 287, 302 (1988) (arguing that paper money was justified under Congress's implied powers, by analogy to the national bank).

7. HURST, *infra* note 344, at 18 ("Finally, the limitations of the developments from 1774 to 1789 point up the extent to which decision making even at a level of very competent constitutional deliberation proceeded under the immediacy of contemporary tensions. If it was to be functional to the continuing life of the country, the Constitution had to develop beyond much of its origins.").

8. Dam, *infra* note 344, at 389 (stating that the evidence that the original intent authorized only metallic coin is such that originalists need to explain "what the Court should do when it concludes that a power the Framers intended to deny has nevertheless become indispensable"); Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393 (1999) (arguing that the original understanding probably limited Congress to metallic coin, but that the natural evolution of money defied the limits of the Constitution).

according to original meaning or original understanding. Finally, a third group of commentators, such as Judge Robert H. Bork<sup>10</sup> and more recently Professors Michael J. Gerhardt<sup>11</sup> and Daniel A. Farber,<sup>12</sup> advance the related argument that the *Legal Tender Cases* are among those Supreme Court decisions that should be treated as “Super Precedents”—decisions that are now so central to the social order that the Supreme Court must follow them even if they were wrongly decided from an originalist standpoint.

Yet the conclusion that the *Legal Tender Cases* conflict with an originalist view of the Constitution rests on a fairly slender foundation.<sup>13</sup> Indeed, the same might be said for those who have argued for the contrary conclusion.<sup>14</sup> This Article is an effort to investigate the question more thoroughly.

The method of originalist analysis employed in this Article is the same that lawyers in the Founding generation would have used.<sup>15</sup> It might be called “original understanding originalism,” as opposed to “original public meaning” or “original intent originalism.”<sup>16</sup> Under the original understanding method, the interpreter seeks and applies the ratifiers’ subjective understanding of the constitutional language, to the extent that subjective understanding is recoverable. If it is not recoverable,

9. Magliocca, *infra* note 344, at 124 (“The history [of the *Legal Tender Cases*] establishes that there is no ‘correct’ test for implied power under all circumstances, because every generation of Americans assigns a different value to federalism.”).

10. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) (arguing that “it is too late to overrule . . . the decision legalizing paper money” because reversing such precedents would “plunge us into chaos”).

11. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1213 (2006).

12. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006). *But see* Randy E. Barnett, *It’s a Bird, It’s A Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1246–47 (2006) (stating that some distinguished economists would quarrel with the conclusion that legal tender paper money is indispensable, or even desirable, in modern society).

13. *See infra* Part I.

14. *See id.*

15. Natelson, *Founders’ Hermeneutic*, *infra* note 344.

16. There is a widespread view among scholars that the Founders would have applied original public meaning analysis, a view that appears to stem from H. Jefferson Powell’s article, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). This view is based on various incorrect assumptions, such as the assumption that eighteenth century courts did not examine legislative history. *See, e.g., id.* at 897 (“The modern practice of interpreting a law by reference to its legislative history was almost wholly nonexistent.”). However, Professor Powell and others relied on very limited sources. The evidence is marshaled and discussed in Natelson, *Founders’ Hermeneutic*, *infra* note 344.

then one applies the original public meaning of the words. Note that the subjective understanding sought is that of the ratifiers rather than that of the drafters, for it was the ratifiers who transformed the Constitution from a proposal into basic law.<sup>17</sup>

Under the Founding-era method of originalism one may proceed either by first identifying the ratifiers' subjective understanding and then using public meaning as a gap-filler, or by first identifying the public meaning and then seeking evidence that the ratifiers had a different or specialized understanding. For purposes of structure and convenience, this Article generally takes the latter approach. Under either approach, however, one should reach the same result.

This Article concludes that the holdings of the *Legal Tender Cases* were consistent with original understanding. Therefore, although it is true that some of the Supreme Court's reasoning in the *Legal Tender Cases* was superfluous, and some was wrong, the end results were clearly correct.

## I. EARLIER ARGUMENTS OVER THE QUESTION

### A. Summarizing Earlier Arguments

The originalist arguments previously made on both sides of the paper money issue are fairly straightforward. Those who contend that the text of the Constitution does not authorize paper currency read the term "coin" in the Coinage Clause<sup>18</sup> as denoting only tokens made of metal.<sup>19</sup> Hence, any power to is-

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17. See Natelson, *Founders' Hermeneutic*, *infra* note 344, at 1288–89; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C.J.):

The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification."

....

From these Conventions, the constitution derives its whole authority. *Id.*; see also JACK N. RAKOVE, *ORIGINAL MEANINGS* 18 (1996) (stating that ratifier understanding has a better claim to be binding than drafter intent).

18. U.S. CONST. art. I, § 8, cl. 5 ("The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin . . .").

19. See *Juilliard v. Greenman*, 110 U.S. 421, 462 (1884) (Field, J., dissenting) ("The meaning of the terms 'to coin money' is not at all doubtful. It is to mould metallic substances into forms convenient for circulation and to stamp them with the impress

sue paper money must be deduced from the Necessary and Proper Clause.<sup>20</sup> However, the argument goes, the Necessary and Proper Clause's authority is limited to *incidental* powers—to means subordinate to the main powers—that would be included even in absence of that Clause.<sup>21</sup> The capacity to issue legal tender paper is not incidental to any enumerated power,<sup>22</sup> but is an independent, unconnected power.<sup>23</sup>

Those who contend that there was no federal power to emit paper money further observe that in *McCulloch v. Maryland*,<sup>24</sup> Chief Justice Marshall said that to be incidental a power must be consistent with the "spirit" of the Constitution.<sup>25</sup> But the spirit of the Constitution, the opponents of paper currency say, is hostile to paper currency. Their evidence includes (1) the instrument's ban on state emission of bills of credit and on certain related actions,<sup>26</sup> (2) the Fifth Amendment Due Process<sup>27</sup> and Takings

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of the government authority indicating their value with reference to the unit of value established by law."); *see also* *Legal Tender Cases*, 79 U.S. 457, 467 (1871) (argument of counsel); *id.* at 584 (Chase, C.J., dissenting); *id.* at 588 (Clifford, J., dissenting); *id.* at 649–51 (Field, J., dissenting); BANCROFT, *infra* note 344 ("In 1787 every English dictionary defined 'money' as metallic coin; and therefore as metallic coin, it must be interpreted in the clause which authorizes the legislature of the United States to borrow money."); HAMMOND, *infra* note 344, at 92 (assuming that coin cannot include paper); Dam, *infra* note 344, at 391 (describing the Supreme Court's refusal in the *Legal Tender Cases* to adopt a non-metallic definition of coin); Holmes, *infra* note 344; Solomon, *infra* note 344, at 81.

20. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be Necessary and Proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *see, e.g.*, *Hepburn v. Griswold*, 75 U.S. 603, 614 (1869) ("It has not been maintained in argument, nor, indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts.").

21. *Legal Tender Cases*, 79 U.S. at 641 (Field, J., dissenting).

22. *Id.* at 484–86 (argument of counsel).

23. *Id.* at 574 (Chase, C.J., dissenting).

24. 17 U.S. (4 Wheat.) 316 (1819).

25. *Id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *Legal Tender Cases*, 79 U.S. at 579–80 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 622.

26. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any . . . Law impairing the Obligation of Contracts . . ."); *see Legal Tender Cases*, 79 U.S. at 580–81 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 623–24.

27. U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . .").

Clauses<sup>28</sup> (both designed to prevent expropriation of the kind historically associated with paper money),<sup>29</sup> (3) the Founders' general dislike of paper money,<sup>30</sup> and (4) proceedings at the federal Convention where delegates deleted from an earlier draft of the Constitution an enumerated congressional power to emit bills of credit.<sup>31</sup> Commentators of the anti-paper money school also cite Ratification-era statements by Luther Martin of Maryland, an Antifederalist who argued that the Constitution gave Congress no power to issue paper money.<sup>32</sup>

On the other hand, those who argue that the original Constitution authorized paper currency observe that the Constitution's specific bans on bills of credit and tender laws apply only to the states, and therefore (*expressio unius est exclusio alterius*) those prohibitions do not apply to the federal government.<sup>33</sup> Additionally, some of the federal Convention delegates who voted to remove the express bill of credit power did so only because they believed that the government would still be able to issue paper money without it.<sup>34</sup> Defenders of paper currency add, further, that the Fifth Amendment is a bar only to direct takings, not to the exercise of regulatory authority that incidentally reduces property values.<sup>35</sup>

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28. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

29. *Legal Tender Cases*, 79 U.S. at 580 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 623–24.

30. *Juilliard v. Greenman*, 110 U.S. 421, 453 (1884) (Field, J., dissenting):

It would be difficult to believe, even in the absence of the historical evidence we have on the subject, that the framers of the Constitution, profoundly impressed by the evils resulting from this kind of legislation, ever intended that the new government, ordained to establish justice, should possess the power of making its bills a legal tender, which they were unwilling should remain with the States, and which in the past had proved so dangerous to the peace of the community, so disturbing to the business of the people, and so destructive of their morality.

31. See HURST, *infra* note 344, at 14 (arguing that “there was unanimity among those who spoke in the federal convention that the intent and effect were to deny Congress authority to issue government obligations designed primarily to furnish a circulating medium for the regular operations of the economy”).

32. E.g., *Legal Tender Cases*, 79 U.S. at 656 (Field, J., dissenting); HAMMOND, *infra* note 344, at 93–94.

33. E.g., *Hepburn*, 75 U.S. at 637 (Miller, J., dissenting).

34. See *infra* notes 234, 237, and accompanying text.

35. *Legal Tender Cases*, 79 U.S. at 551.

Perhaps surprisingly, paper money advocates generally concede that the Coinage Clause authorizes only metallic tokens.<sup>36</sup> They maintain, however, that the authority incidental to various express federal powers<sup>37</sup> was sufficient to permit emission of paper.<sup>38</sup> To support this argument, they adopt definitions of “incidental” that embrace all actions facilitating express powers<sup>39</sup> or linked to express powers in the aggregate.<sup>40</sup> Some paper money advocates have argued that the federal government has authority to issue legal tender paper money even in the absence of constitutional enumeration, simply because the authority to emit paper money is inherent in national sovereignty.<sup>41</sup>

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36. Pai, *infra* note 344, at 544 (explaining that in the 1862 congressional debates over the issue of greenbacks, “both sides agreed that no provision within Article I, Section 8 expressly granted Congress the power to issue legal tender notes”); *see also* Juilliard v. Greenman, 110 U.S. 421, 448 (1884) (calling the coinage power “analogous” to the power to issue paper money); *Legal Tender Cases*, 79 U.S. at 521–22 (reporting the attorney general’s argument that some find a broader meaning in the term “coin,” but neglecting it in favor of an argument under the Necessary and Proper Clause); *id.* at 547, 553 (declining to rest the Court’s opinion on the Coinage Clause); Thayer, *infra* note 344, at 83–84 (“I cannot doubt that the word *money* in the coinage clause is limited to metallic money.”). *But see* RICHARD C. MCMURTRIE, PLEA FOR THE SUPREME COURT: OBSERVATIONS ON MR. GEORGE BANCROFT’S PLEA FOR THE CONSTITUTION 19–22 (1886) (arguing that the Constitution uses a broader meaning of “coin”).

37. *Hepburn*, 75 U.S. at 632 (Miller, J., dissenting) (listing the powers to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money, to pay debts, and to provide for the common defense and general welfare).

38. Thus, the Necessary and Proper Clause received much attention in the 1862 congressional debates, Pai, *infra* note 344, at 547–48, and the Supreme Court cases on the legal tender issue, Juilliard, 110 U.S. at 440–41; *Legal Tender Cases*, 79 U.S. at 522–26 (argument of attorney general); *id.* at 533–43 (opinion of the Court). *See also* Dam, *infra* note 344, at 391–94; Thayer, *infra* note 344, at 91–97.

39. Thayer, *infra* note 344, at 94 (stating that incidental powers include all powers that make the express powers “do [their] usual office . . . more effectually and fully”); *see also id.* at 95 (stating that it is within congressional discretion to “give to its currency the quality of legal tender,” because “it will thus be a better instrument for borrowing purposes”). “Currency” is defined as “[a]nything that is employed as a medium of exchange, whether an article, coin, or paper money.” DODD, *infra* note 344, at 343.

40. *See Legal Tender Cases*, 79 U.S. at 539 (adopting an aggregate powers thesis).

41. *See id.* at 545; *see also id.* at 556 (Bradley, J., concurring). Although the Court’s discussion of sovereignty in Juilliard mentions the theory of inherent sovereign power as an alternative ground, it relies more heavily on the contention that because legal tender laws were a customary attribute of sovereign governments when the Constitution was adopted, such laws were within the range of incidental powers. Juilliard, 110 U.S. at 440–50; *see* Natelson, *Tempering*, *infra* note 344 (discussing the role of custom in the law of incidental powers). *But see* Dam, *infra* note 344, at 394–96 (arguing that the Juilliard court relied on the inherent sovereign power rationale).

### B. Assessing Prior Arguments

Most of the foregoing arguments are unsatisfying. One might have expected an inquiry into whether the phrase “to coin Money” encompassed paper, for an affirmative answer would render the implied-powers arguments of both sides unnecessary. But neither side has made such an inquiry, and both have assumed that the phrase “to coin Money” was limited to metallic tokens. They have so assumed even though the Constitution’s wording and structure should have encouraged investigation. As explained below,<sup>42</sup> ascribing a purely metallic meaning to “coin” creates serious textual difficulties. Similarly uninvestigated has been whether the phrase “to regulate the Value”<sup>43</sup> was intended to grant Congress authority to confer legal tender status.

Two doctrinal arguments raised by the advocates of paper money are seriously flawed. First, the concept of inherent sovereignty, although referenced in a few Supreme Court decisions,<sup>44</sup> is flatly precluded by the text of the Tenth Amendment,<sup>45</sup> as the

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The first case to sustain the issuance of bills of credit relied on post-constitutional practice, and did not address the original understanding. *Veazie Bank v. Fenno*, 75 U.S. 533, 548 (1869):

And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them . . . .

42. See *infra* notes 282–83 and accompanying text.

43. U.S. CONST. art. 1, § 8, cl. 5.

44. See *United States v. Lara*, 541 U.S. 193, 201 (2004) (asserting that Congress’s legislative authority to deal with Indian tribes might “rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government”); *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936) (citing inherent governmental power in foreign affairs); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (discussing inherent power to expel aliens as part of the foreign affairs power). It is not always clear, however, whether the Court means that a power is “inherent” in the sense of extra-constitutional or whether it is “inherent” in one or more enumerated powers, and therefore incidental to them. Cf. *id.* at 711–13 (listing and discussing enumerated powers over foreign affairs).

45. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). See *Juilliard*, 110 U.S. at 466–67 (Field, J., dissenting) (noting that authority to establish legal tender based upon inherent sovereignty is precluded by the Tenth Amendment); BANCROFT, *infra* note 344 (pointing out that “[w]ithin the limits of the states, the government of the United States of America has no powers but those that have been delegated to it”).

Court itself has observed.<sup>46</sup> Second, paper advocates' interpretation of the doctrine of incidental powers is inconsistent with the law of the Founding Era, which limited incidental authority to that either customary or reasonably necessary for exercising a principal power.<sup>47</sup> A power did not become incidental merely because it facilitated the exercise of the principal power,<sup>48</sup> and it could never be incidental if it was independent of, or as important as, the principal.<sup>49</sup> The Framers would not have classified a power as important as the issuance of paper money as a mere incident to the issuance of metallic coinage.<sup>50</sup>

On the other hand, the opponents of paper money cite no decisive evidence that the Founders understood the Takings Clause to extend beyond direct takings.<sup>51</sup> Instead, they retroactively insert the doctrine of substantive due process into the Founding Era, even though that doctrine was not invented until *Dred Scott*<sup>52</sup> almost a century later, and was not generally applied until the late nineteenth century.<sup>53</sup> They also cite Chief

46. *Kansas v. Colorado*, 206 U.S. 46, 90 (1907).

47. This discussion follows the review of the Founding generation's doctrine of incidental powers in Natelson, *Tempering*, *infra* note 344, at 102–13.

48. See *Legal Tender Cases*, 79 U.S. 457, 543 (1870) (“It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger.”).

49. JACOB, *DICTIONARY*, *infra* note 344 (defining “Incident”).

50. Oliver Wendell Holmes agreed. See *Review of The Legal Tender Cases of 1871*, *infra* note 344 (stating that an express power cannot be enlarged by an incident to another express power).

51. The first Supreme Court case on the subject was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), decided well after the Founding Era. Of course, the Takings Clause did not initially apply to the states, which could explain the Court's lack of activity. Commentators have split on whether Founding-era principles justify the doctrine of *Pennsylvania Coal*. Compare John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (arguing that colonial practices do not justify compensation for ameliorative regulations), with Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181 (1999) (arguing that Founding-era precedent supported the doctrine of regulatory takings).

52. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856) (holding that the United States, when exercising its powers under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, to determine the internal law of the territories, violates the Due Process Clause by banning a particular kind of property (slaves) therein). Some Founding-era judges and lawyers believed there were inherent limits on the scope of substantive legislation, but they did not base their arguments on the Due Process Clause.

53. The first case, other than *Dred Scott*, to rely on substantive due process as a ground to strike down a law was *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), although the Supreme Court had approved of the doctrine in dicta in several previous cases. ERWIN CHERMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 611–14 (3d

Justice Marshall's reference to the "spirit" of the Constitution,<sup>54</sup> but appear to be unaware of what he meant. In Marshall's time the "spirit" of a document was a synonym for the intent of the makers.<sup>55</sup> In the constitutional context, the "spirit" was the understanding of its ratifiers.<sup>56</sup> However, opponents of paper money (like their adversaries) have investigated only the intent of the *drafters*, with inconclusive results.<sup>57</sup> They have sought almost nothing of the views of the *ratifiers*.<sup>58</sup> All this explains the need for a fresh look at the evidence.

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ed. 2006). Substantive due process should not, of course, be confused with judicial review under straightforward application of natural law principles, which some Founding-era judges advocated. *See id.* at 608–10; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring) (citing "the reason and nature of things").

54. *E.g.*, *Hepburn v. Griswold*, 75 U.S. 603, 623 (1869) ("But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation . . ."); *see also* Magliocca, *infra* note 344, at 141 (interpreting the "spirit" position, following *Hepburn*, as justifying heightened judicial scrutiny when an arguably necessary and proper law impairs rights elsewhere in the text; the speculation, however, is ahistorical).

55. Natelson, *Founders' Hermeneutic*, *infra* note 344, at 1252–53.

56. *See supra* note 17 and accompanying text; *see also* *McCulloch v. Maryland*, 17 (4 Wheat.) U.S. 316, 403 (1819) ("From these [ratifying] Conventions, the constitution derives its whole authority.").

57. *See, e.g.*, *Juilliard v. Greenman*, 110 U.S. 421, 443–44 (1884); *Legal Tender Cases*, 79 U.S. 457, 496 (1871) (argument of counsel); *id.* at 585 (Chase, C.J., dissenting); *id.* at 605–07 (Clifford, J., dissenting); *id.* at 653–55 (Field, J., dissenting); BANCROFT, *infra* note 344; Dam, *infra* note 344, at 384–88; HAMMOND, *infra* note 344, at 92–93; Holmes, *infra* note 344, at 147; Thayer, *infra* note 344, at 73–78, 80; *see also* Pai, *infra* note 344, at 572–77 (summarizing the 1862 congressional debate on the subject).

58. In his 1884 pamphlet on the issue, even the distinguished historian George Bancroft failed to give significant attention to the ratification debates. BANCROFT, *infra* note 344; *see also* *Legal Tender Cases*, 79 U.S. at 498 (setting forth the argument of counsel that, "[n]o framer of the Constitution, no judge, no commentator, is found prior to this law who claimed any such power for Congress," but not discussing ratification at any length); *id.* at 656 (Field, J., dissenting) (arguing that there was a unanimity of opinion against paper money at the ratifying conventions, also without significant discussion).

Professor Hurst cited one Ratification-era quotation in his text, HURST, *infra* note 344, at 15, and one such quotation in one of his footnotes, *id.* at 25–26, n.57. Unfortunately, Professor Hurst dismissed them without recognizing that they were heavily corroborated in other parts of the ratification record. *See infra* Part IV. Similarly, Bray Hammond cited an important Ratification-era comment from David Ramsey and a corroborative remark by Alexander Hamilton, but failed to explore further. *See* HAMMOND, *infra* note 344, at 94.

Although records from the Ratification Era formerly were less readily available than they now are (thanks to the Internet and publication of DOCUMENTARY HISTORY, *infra* note 344), this is not a sufficient excuse for the neglect. Transcripts from the state ratifying conventions have been publicly available at least since 1836, when ELLIOT'S DEBATES, *infra* note 344, was published. The ratification debates reproduced in that work include many important remarks on the subject. *See infra* Part IV.

## II. THE HISTORICAL CONTEXT OF THE COINAGE CLAUSE

A. *English Law and Practice*

In eighteenth century Anglo-American law and practice, when the term “commerce” was used in an economic sense, it encompassed the buying and selling of goods and several associated activities, such as navigation, marine insurance, commercial paper, and banking.<sup>59</sup> The Framers all had lived the first part of their lives under law that identified the Crown as “the arbiter of commerce”<sup>60</sup> within Great Britain. The royal prerogative was the primary source of commercial regulation, although in practice Parliament enjoyed a significant role as well.<sup>61</sup> In the words of William Blackstone:

WITH us in England, the king’s prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

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59. See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006); Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003).

60. 1 WILLIAM BLACKSTONE, COMMENTARIES \*263.

61. See *id.* at \*268 (stating that the King’s power to debase or enhance the currency may be limited and that the consent of Parliament was necessary to regulate foreign coin by a standard other than that used for British money); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1117 (1833) (pointing out that from the time of Magna Carta until his own time there were over twenty acts of Parliament on the subject of weights and measures); DODD, *infra* note 344, at 80 (stating that during William and Mary’s reign the coinage power was conceded to Parliament). This state of affairs, however, was clearly temporary.

Sir Edward Coke seems to have argued that the King’s monetary power was restricted in various ways, 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 576–78 (E. & R. Brooke 1797) (1628), but this argument was widely rejected, 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, A NEW EDITION 193–94 (1778) (correcting Coke); 4 COMYNS, *infra* note 344, at 255 (“So, by the Common Law, the Power to make or coin Money within his Dominions belongs only to the King.”); *id.* at 256 (“And if the King by Proclamation makes a mixt or base Money Current, it shall be so.”); 4 BACON, *infra* note 344, at 162 (stating of the King, “That at the first Institution of any Coin within this Kingdom, the King and he alone sets the Weight, the Alloy, the denominated Value of all Coin . . . He may by his Proclamation legitimate foreign Coin, and make it Current Money of this Kingdom according to the Value imposed by such Proclamation . . . He may inhance the external Denomination of any Coin already established, by his Proclamation”). The power to regulate money was still seen as a branch of the power to regulate commerce, notwithstanding this dispute.

FIRST, the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging . . . .

SECONDLY, the regulation of weights and measures . . . .

THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current [that is, to declare it to be legal tender].<sup>62</sup>

. . . .

The king may also at any time decay, or cry down, any coin of the kingdom, and make it no longer current.<sup>63</sup>

Blackstone's summation was supported by the leading judicial decision on the subject:<sup>64</sup> the *Case of Mixed Money*.<sup>65</sup>

James I was on the throne when the Privy Council decided the *Case of Mixed Money*, but the controversy had begun during the reign of Queen Elizabeth. In April 1601, an Irish merchant, Brett of Drogheda, purchased some goods from a London merchant named Gilbert, for which Brett promised to pay £200, half of which was to be remitted at a certain locale in Dublin shortly thereafter, payable in "sterling, current and lawful money of England."<sup>66</sup> On May 24, 1601, however—before Brett was to tender the first £100—Elizabeth issued for Ireland, then under English control, a coinage made of an alloy of silver and base metal. The Queen ordered that this "mixed money" was to replace the more nearly silver "sterling" coins that before had

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62. That this principle includes the power to declare money legal tender is clear from the context. Blackstone says the King has power to "legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments." Nevertheless, "[t]here is at present no such legitimated money; Portugall coin being only current by private consent." 1 WILLIAM BLACKSTONE, COMMENTARIES \*268.

63. *Id.* at \*264–68; see also CHAMBERS, CYCLOPEDIA, *infra* note 344 (defining "Money") ("And as *money* is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority, or make it current.").

64. The decision is heavily featured in popular contemporaneous secondary sources. See, e.g., 4 BACON, *infra* note 344, at 5–6 (citing to various pages of "*Dav.*" in which the case was reported); 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, A NEW EDITION 188, 192–94 (1778) (summarizing and discussing the case).

65. P.C. 1604, *Dav.* 48, 80 Eng. Rep. 507. This case seems to have been overlooked by modern writers on the Coinage Clause, perhaps because it is composed almost entirely in Law-French and Latin.

66. *Dav.* at 18, 80 Eng. Rep. at 507 ("*sterling, currant & loyall money; Dengleterre*").

circulated in Ireland. She further ordered that the new coinage was to be legal tender, for she

expressly commanded that this money should be so used, accepted and reputed by all her subjects and others, using any traffick, or commerce within this kingdom; and that if any person or persons should refuse to receive this *mixed money* according to the denomination or valuation thereof, viz. shillings for shillings, sixpenny pieces for sixpenny pieces, &c. being tendered for any payment of any wages, fees, stipends, debts, &c. they should be punished . . . .<sup>67</sup>

At the appropriate time and place, therefore, Brett offered Gilbert £100 in the new, less valuable currency, which, of course, Gilbert did not want to accept. The question before the Privy Council was whether Brett had made a good tender.

The Council decided that he had. First, it declared that every country needed a common standard of money for purposes of exchange. Citing civil law scholar Jean Bodin, the Council characterized money as a “public measure,”<sup>68</sup> for “[m]oney is the proper medium and measure of the exchange of things.”<sup>69</sup> Implicit in this characterization was the idea that the power over money was closely related to the weights and measures power: a relationship acknowledged as uncontroversial fact in eighteenth-century American writings.<sup>70</sup>

67. Dav. at 18, 80 Eng. Rep. at 507:

*[E]xpressement command que ceux moneyes serront issint use, accept & reputed, per tous ses subjects, & auters usant ascun traffique ou commerce deins cest realm: & que si ascun person ou persons refuseront de recevoir ceux mixt moneyes, solonque le denomination ou valuation d'ceux, viz. shillings per shillings, & les pieces de 6d. per 6d. & sic de cæteris, esteant tend' per paymentt des ascuns wages, fees, stipends, ou debts, &c. ils serront punish . . . .*

The translation from Law-French is found in ANONYMOUS, A REPORT OF CASES AND MATTERS IN LAW, RESOLVED AND ADJUDGED IN THE KING'S COURTS IN IRELAND, COLLECTED AND DIGESTED BY SIR JOHN DAVIES [sic] 48 (1762). The same translation from Law-French is used throughout. This version retains large segments of Latin, however, which I have translated.

68. Dav. at 19, 80 Eng. Rep. at 507 (“*mensura publica*”).

69. Dav. at 18, 80 Eng. Rep. at 507 (“*Moneta est justum medium & mensura rerum commutabilium.*”).

70. E.g., Samuel Mather, NEW-ENG. WKLY. J., Feb. 4, 1734, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 21 (setting forth a view of the relationship between the “regulation” of weights and measures and that of money); *Extract of a Letter: “To a Gentleman in a Neighbouring Government Concerning the New Notes of Hand”* (1734), in BANKING AND CURRENCY, *infra* note 344, at 37 (calling currency “the Measures and Balances by which Men dealt one with another” and criticizing “Divers Weights and a false Balance”); Pelatiah Webster, *Strictures on Tender-Acts*, Dec. 13, 1780, in BANKING AND CURRENCY, *infra* note 344, at 125–26:

Next, the Council ruled that it was the Crown's exclusive prerogative to make or coin money<sup>71</sup> and that "it appertaineth to the King only to put a value upon coin, and make the price of the quantity, and to put a print to it; which being done the coin is current."<sup>72</sup> The Council asserted that "[t]here should be one faith, weight, measure, money."<sup>73</sup> It was custom for the Crown to exercise this power by royal proclamation, although, the Council added, Parliament sometimes adopted acts in aid of royal authority.<sup>74</sup>

Thirdly, the Privy Council ruled "that as the King by his prerogative may make money of what matter and form he pleaseth, and establish the standard of it, so may he change his money in substance and impression, and enhance or debase the value of it, or entirely decry and annul it"<sup>75</sup> and that he could "set the value of money" at his own discretion, without the consent of others.<sup>76</sup> In the Council's view, the power to strike coin and to regulate its value went together as a matter of law: "*Monetae aestimationem dat qui cudendi potestatem habet.*"<sup>77</sup> In other words, the Crown had full right to claim *seigniorage*, the profit generated from pegging the currency at a legal tender

The nature of a Tender-Act is not more or less than establishing by law the standard value of money, and has the same use with respect to the currency, that the legal standard pound, bushel, yard, or gallon has to these goods, the quantities of which are usually ascertained by those weights and measures . . . .

71. Thus: "*Jus cudendae monetae ad solum principem, hoc est, imperatorem, de jure pertinet*"—that is, "By law, the right of striking money extends only to the prince, that is, the emperor" (referring to Roman practice). Dav. at 20, 80 Eng. Rep. at 509.

72. Dav. at 19, 80 Eng. Rep. at 508 ("*appertient al Roy solement de metter value al coine, & faire le price del quantitie, & de metter print a ceo; le quel esteant fait, le coine est currant*").

73. Dav. at 19, 80 Eng. Rep. at 508 ("*Una fides, pondus, mensura, moneta sit una*").

74. Dav. at 20–21, 80 Eng. Rep. at 509 ("*Et semble que ceux changes de moneys en Angleterre fueront fait per le autoritie del Roy sans Parliament, coment que plusors Acts de Parliament ont estre fait pur ordering del eschange, & a prohibiter le exportation des moneys faits & ordeines per le Roy, & le importation & utterance de forreine & faux moneys, sur certeine paines & penalties, dont ascuns fueront capitall, & ascuns pecuniary*").

75. Dav. at 20, 80 Eng. Rep. at 509 ("*que sicome le Roy per son prerogative poet faire moneys de quel matter & forme luy plerra, & establisher le standard de ceo, issint poet il changer son money en substance & impression, & enhauser ou abaser le value de ceo, ou tout ousterment decrier & adnuller ceo*").

76. Dav. at 22, 80 Eng. Rep. at 510 ("*princeps ad arbitrium suum, irrequisito assensu subditorum, valorem monetæ constituere potest*"—that is, "the prince may set the value of money at his own discretion, without the consent of his subjects").

77. Dav. at 20, 80 Eng. Rep. at 509 (meaning, "He gives the value to money who has the power of striking it.").

value greater than the sum of the minting and material costs.<sup>78</sup> The Council added that the power of the sovereign to alter the form of money *included the power to use any material he or she chose*. The sovereign could even fabricate money out of leather if he or she so pleased.<sup>79</sup> (Indeed, later in the century, the deposed James II, then in possession of Ireland, actually did coin leather money.<sup>80</sup>)

Finally, the Privy Council ruled that the King's prerogative extended to Ireland as well as to England.<sup>81</sup> Notwithstanding the difference in intrinsic value between the older and newer Irish coinage, therefore, Gilbert was bound to accept Brett's tender.

The holding of the *Case of Mixed Money* was reinforced by other circumstances. Just three years previously, *Wade's Case*<sup>82</sup> had held that the Crown could proclaim what foreign coin was legal tender and the exchange rate at which one was compelled to accept it.<sup>83</sup> In later years, English sovereigns actively employed the powers recognized in the *Case of Mixed Money* and in *Wade's Case*. For instance, in 1672, Charles II coined copper farthings and half-pence as subsidiary coins,<sup>84</sup> and proclaimed them legal tender for payments under the value of sixpence.<sup>85</sup>

78. DODD, *infra* note 344, at 344 (defining "*seigniorage*" [also spelled "*seignorage*") as "[a] charge made by the sovereign on the issue of coin over and above the expenses of coinage and the value of the metal").

79. Dav. at 22, 80 Eng. Rep. at 511 ("*etiam ut ex corio fieri possit*" — that is, "it could even be made out of leather").

80. Thomas Hutchinson, *Comments on Massachusetts Banking and Bills of Credit* (1769), in *BANKING AND CURRENCY*, *infra* note 344, at 72, 73. Moreover, during the reign of Henry VIII, the King's minister, Thomas Cromwell, had discussed in Parliament the possibility of leather currency. BRAUDEL, *infra* note 344, at 353.

81. Dav. at 21, 80 Eng. Rep. at 510 ("*Et sicome le Roy ad tous foits use de faire & chaunger les moneyes de Engleterre, il ad auxy use mesme le prerogative en Ireland*").

82. *Wade's Case* (C.P. 1601) 5 Co. Rep. 114a, 77 Eng. Rep. 232.

83. *Id.* at 232 (holding that the King had the power to declare foreign money "current" — that is, legal tender that a citizen must accept); HUGH VANCE, *AN INQUIRY INTO THE NATURE AND USES OF MONEY*, reprinted in 3 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 365, 409 ("It is the undoubted Prerogative of the civil Magistrate, to appoint all the common Measures of Quantity and Value, and to change them as just Occasions may require, and more especially to order what shall be adjudged Money in the Law . . . They have (and it is their undoubted Right) said, that the Bills shall be a *lawful Tender* where Money is promised . . .") (italics in original); see also 4 BACON, *infra* note 344, at 162.

84. "Subsidiary coins" are "coins which are issued by public authority but are not full legal tender." DODD, *infra* note 344, at 344.

85. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*277–78 ("[S]ir Edward Coke lays it down, that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and half-

His successors, James II (1685–1689) and William and Mary (1689–1702), coined half-pence and farthings in tin.<sup>86</sup> In 1704, Queen Anne extended her prerogative beyond the British Isles by fixing the legal rates for various foreign coins circulating in the colonies.<sup>87</sup>

The sovereign was always free to set the legal tender value well above intrinsic value, as Queen Elizabeth had done for Ireland. Queen Anne's proclamation for the colonies mandated legal tender values higher than intrinsic values for all coins listed.<sup>88</sup> In Britain, gold passed by weight, but the legal tender value of silver or copper coin was set at its "tale," or face amount,<sup>89</sup> which was generally above intrinsic value.<sup>90</sup>

To summarize: The royal prerogative included authority to regulate British domestic commerce, and regulation by prerogative sometimes was extended to the colonies. As the Framers recognized, this commercial authority included governance of weights and measures, of which the medium of payment was considered one branch.<sup>91</sup> The royal power over the medium of payment included authority to strike "coin" of any denomination and from any material, and to regulate the value of that coin and of foreign money. Regulating the value of money encompassed designating what items were legal tender and at

pence were coined by king Charles the second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise."); see also CHAMBERS, CYCLOPEDIA, *infra* note 344 (defining "Money").

That some English money was legal tender, and some was not, supports Professor Thayer's argument that money need not be legal tender. See Thayer, *infra* note 344, at 85–88.

86. DODD, *infra* note 344, at 81.

87. 1 BANKING AND CURRENCY, *infra* note 344, at 17 (reprinting original document).

88. For example, the intrinsic value of a "Seville ps. of Eight old plate" was listed as four shillings, sixpence, but its legal tender value was declared to be six shillings. *Id.* at 17.

89. DODD *infra* note 344, at 132. "Payment by tale" is defined as "Payment by reckoning coins at their nominal value, instead of at their intrinsic value as bullion." *Id.* at 344.

90. Franklin, *infra* note 344, at 214 (stating that the intrinsic value of silver coin could be as little as one-half its legal-tender value).

91. *E.g.*, THE FEDERALIST NO. 69, at 361 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[The King] is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin."); JOHN ADAMS, NOVANGLUS, OR A HISTORY OF THE DISPUTE WITH AMERICA, reprinted in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 256, 282 (C. Bradley Thompson, ed. 2000) (stating that "coin [is] . . . of absolute prerogative to the king without parliament").

what rates (and for what debts) they had to be accepted. The Crown took any profit derived from setting legal tender value higher than minting costs.

## B. *Law and Practice in the Colonies*

### 1. *Before the Currency Act of 1764*

#### a. *Origins to Mid-Century*

In England, metal had been the only serious money over a continuous history of nearly two thousand years.<sup>92</sup> When the first bank notes<sup>93</sup> and Exchequer bills<sup>94</sup> appeared in the seventeenth century, they were not legal tender,<sup>95</sup> nor, apparently, were they thought of as money, containing inherent value.<sup>96</sup> Contemporary British lay dictionaries,<sup>97</sup> legal dictionaries,<sup>98</sup> and digests<sup>99</sup> usually referred to both “coin” and “money” in terms of metal.

In Britain’s American colonies, however, conditions were very different. Throughout the seventeenth and eighteenth cen-

92. See DODD, *infra* note 344, at 1–2.

93. “A ‘bank note’ is ‘a promissory note, made by a banker, payable to bearer on demand and intended to circulate as money.’” *Id.* at 177.

94. These were short-term debt instruments that paid interest. First issued in 1696, they eventually circulated as currency. See *id.* at 91.

95. *Id.* at 125. Bank of England bank notes became legal tender in 1833. *Id.* at 149.

96. Bank notes were, however, used extensively in Britain for larger transactions. FRANKLIN, *infra* note 344, at 213.

97. JOHNSON, *DICTIONARY*, *infra* note 344 (defining “to coin” as “1. To mint or stamp metals for money. . . . 3. To make or forge any thing, in an ill sense,” and defining “money” as “Metal coined for the purposes of commerce”); CHAMBERS, *CYCLOPEDIA*, *infra* note 344 (defining “money” as “a piece of metal marked for coin, with the arms of a prince, or state, who make it circulate or pass, at a fixed rate, for things of different value”).

98. JOHN COWELL [or “COWEL”], *A LAW DICTIONARY OR THE INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS OF GREAT BRITAIN, AND IN TENURES AND JOCULAR CUSTOMS* (1727) (defining “Money” as “that Metal, be it Gold or Silver, that receives an Authority by the Prince’s *Impressa* to be current: For as Wax is not a Seal without Print, so Metal is not *Money* without *Impression*”); 1 TIMOTHY CUNNINGHAM, *A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW* (3d ed. 1783) (defining “Coinage” as “the stamping and making of *money* by the King’s authority,” and “Money” as “that metal, be it gold or silver, that receives an authority by the Prince’s *impress* to be current”); JACOB, *DICTIONARY*, *infra* note 344 (defining “Money” in much the same way); *STUDENT’S LAW DICTIONARY*, *infra* note 344 (defining “Money” as “denot[ing] Gold, Silver, Copper, or other Kind of Metal, that receives Authority by the King’s *Impression* to be current”).

99. 4 COMYNS, *infra* note 344, at 354 (assuming that current money must be coin).

turies, British America enjoyed what was probably the fastest-growing economy in the world.<sup>100</sup> A surging rate of economic exchange required a circulating medium that would keep pace. Yet British America had no gold or silver mines, and the authorities in London decided against flooding their colonies with specie. With one temporary exception, the authorities also forestalled efforts to establish mints in America.<sup>101</sup>

Most of the limited specie available was Dutch, Portuguese, or Spanish,<sup>102</sup> with the most common coin being the Spanish dollar, or "piece of eight."<sup>103</sup> The British accepted these foreign tokens as the primary colonial circulating medium, and set their values by royal proclamation.<sup>104</sup> But even with foreign issues available, the quantity of specie proved woefully inadequate for American needs.<sup>105</sup> Americans also resorted to sophisticated forms of barter, which proved to be clumsy and therefore unsatisfactory.<sup>106</sup>

It was in this context that the colonists embarked upon an extraordinary voyage of financial creativity. "One would be hard pressed," observed Professor Richard Sylla, "to find a place and time in which there was more monetary innovation than in the British North American colonies in the century and a half before the American Revolution."<sup>107</sup>

During the seventeenth century, New Englanders made wampum their principal measure of ordinary retail trade.<sup>108</sup>

100. Sylla, *infra* note 344, at 23.

101. The documents creating the mint are set forth in *Coinage: The Establishment of a Mint in Massachusetts* (1652), reprinted in *BANKING AND CURRENCY*, *infra* note 344, at 14–15. See also MYERS, *infra* note 344, at 5 (stating that the Pine Tree Shilling was the only coin minted in the colonies during the colonial period). The Massachusetts mint was established in 1652 and coined Pine Tree Shillings for about 30 years. MARKHAM, *infra* note 344, at 47. An edict closing the mint is reproduced at *Royal Edict Repealing the "Law on a Mint House"* (1665), reprinted in *BANKING AND CURRENCY*, *infra* note 344, at 16. One William Wood briefly had a right to make copper coins for America, but soon sold it to the Crown. MARKHAM, *infra* note 344, at 47.

102. MYERS, *infra* note 344, at 4–5.

103. MARKHAM, *infra* note 344, at 48; DODD, *infra* note 344, at 231.

104. MARKHAM, *infra* note 344, at 48.

105. The reasons and the extent of the shortage are disputed. See, e.g., Sylla, *infra* note 344, at 23 (listing some possible explanations, but emphasizing rapid economic growth); Weiss, *infra* note 344, at 773–75, 783–84.

106. For example, Americans frequently used "bookkeeping barter," a system whereby "goods were traded for other goods, and excess credits were carried on account." MARKHAM, *infra* note 344, at 46.

107. Sylla, *infra* note 344, at 23.

108. *Id.*

Virginians and Marylanders paid their bills in tobacco.<sup>109</sup> South Carolinians remitted quit rents and public charges with skins, cheese, tar, whale oil, butter, tallow, corn, wheat, tobacco, pork, and beeswax.<sup>110</sup> At various places and times other colonists resorted to sugar, rum, molasses, beads, bullets, rice, indigo, and other products as currency.<sup>111</sup>

Such practices encouraged colonial governments to bestow legal-tender quality upon different media at different times, without waiting for royal permission to do so. In 1637, the government of Massachusetts declared white wampum legal tender for debts under twelve pence at the rate of four white beads per penny, and in 1640 it declared “blueu” wampum legal-tender at 2 beads per penny.<sup>112</sup> Wampum retained this legal tender status for another twenty-one years.<sup>113</sup> Massachusetts also designated musket balls legal tender at four per penny.<sup>114</sup> Wool became legal tender for some purposes in Rhode Island, as did rice in South Carolina.<sup>115</sup>

Not surprisingly, this experimentation gave Americans expansive ideas about the materials proper for money. One Boston essayist writing in 1740 defined “Money” as “*any Matter, whether Metal, Wood, Leather, Glass, Horn, Paper, Fruits, Shells, Kernels &c. which hath Course as a Medium of Commerce*”<sup>116</sup>—a formulation in sharp contrast to the metal-oriented definitions current in Britain.<sup>117</sup> It was during the course of this experimentation that the British colonists created “the first fiat paper moneys in the western world.”<sup>118</sup>

109. MARKHAM, *infra* note 344, at 44–45; DODD, *infra* note 344, at 227.

110. MARKHAM, *infra* note 344, at 46, 57.

111. DODD, *infra* note 344, at 229; MARKHAM, *infra* note 344, at 43; MYERS, *infra* note 344, at 4; *see also* William Douglass, *An Essay, concerning Silver and Paper Currencies*, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 218, 226 (listing as preferred media of exchange tobacco in Virginia, rice in South Carolina, and produce in North Carolina).

112. BANKING AND CURRENCY, *infra* note 344, at 11 (reprinting original document).

113. *Id.* at 13.

114. MARKHAM, *infra* note 344, at 46.

115. DODD, *infra* note 344, at 229.

116. HUGH VANCE, AN INQUIRY INTO THE NATURE AND USES OF MONEY, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 365, 396 (italics in original); *see also* Anonymous, *A Letter from a Gentleman in Boston to his Friend in Connecticut*, in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 217, 229.

117. *See supra* notes 96–99 and accompanying text.

118. Sylla, *infra* note 344, at 23. On the priority of the colonies in using fiat money, *see* MYERS, *infra* note 344, at 6. The Chinese were said to have invented paper money centuries earlier. *Id.*

The colonists were familiar with bills of exchange in foreign transactions, promissory notes in domestic transactions, and letters of credit.<sup>119</sup> These instruments may have planted the idea of using paper as material for currency. Whatever the inspiration, some kind of informal paper medium—its exact nature is uncertain—was circulating in New England well before 1684.<sup>120</sup> In 1690, Massachusetts issued the first government-sponsored American paper money in the form of £7000 in bills of credit.<sup>121</sup> That colony emitted another £33,000 the following year, of which £10,000 was eventually redeemed and burned.<sup>122</sup> More Massachusetts paper appeared in 1702 and later.<sup>123</sup> The colony of South Carolina issued paper money in 1703; New Hampshire, New York, and Connecticut did so in 1709; Rhode Island in 1710; North Carolina in 1712; Pennsylvania in 1723; and Maryland in 1733.<sup>124</sup> By 1760, every colony had followed suit.<sup>125</sup>

Much has been said of the depreciation of American paper money during the eighteenth century. Power over the currency is, of course, a standing temptation for the government to cheat the public, and—human nature being what it is—sometimes the government yields to the temptation. Even in Britain, which for centuries prided itself on a sound system grounded in precious metals, there were recurrent instances of devaluation and, occasionally, of outright theft.<sup>126</sup> When currency is fabricated from base material, it is fairly easy for those in power to

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119. MARKHAM, *infra* note 344, at 45–49; *see also* NEWMAN, *infra* note 344, at 11 (listing other antecedents to colonial issues).

120. *See, e.g., Bills of Credit: A Contemporary Observation of the Evolution of Money in New England* (1684), reprinted in BANKING AND CURRENCY, *infra* note 344, at 18 (reprinting original document stating that “for some years Paper-Bills passed for payment of Debts”).

121. *See* MYERS, *infra* note 344, at 8; *see also* BANKING AND CURRENCY, *infra* note 344, at 19 (reprinting the inscription on a five shilling bill). This issue was said to be inspired by British Exchequer bills. MARKHAM, *infra* note 344, at 50.

122. MYERS, *infra* note 344, at 8.

123. *Id.*

124. Sylla, *infra* note 344, at 25.

125. MARKHAM, *infra* note 344, at 51; *see also* WILLIAM DOUGLASS, A DISCOURSE CONCERNING THE CURRENCIES OF THE BRITISH PLANTATIONS IN AMERICA (1740), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 307, 314–27 (detailing the situation colony-by-colony as of 1740).

126. *See* DODD, *infra* note 344, at 42–43 (debasement under Henry VIII); *id.* at 49–50 (dishonest coin exchange under Elizabeth I); *id.* at 72–73 (outright theft of deposits by Charles I); *id.* at 76–77 (partial governmental default under Charles II); *id.* at 138 (successive debasements under various reigns from the middle ages to the early nineteenth century).

“pay” the government’s bills by issuing money faster than the economy produces goods and services.

During the first half of the eighteenth century, the currencies in all four New England colonies performed as poorly as a pessimist might expect.<sup>127</sup> The value of paper bills was stable for a few years after the 1690 Massachusetts emission,<sup>128</sup> but then began to dwindle. In 1736, Thomas Hutchinson—a leading political figure who later became the colony’s last civilian royal governor—reported that Massachusetts notes initially worth twenty-seven shillings were then worth only eight.<sup>129</sup> In 1702, £100 sterling could be had for £133 in Massachusetts currency; by 1749 one needed £1100 in Massachusetts bills to purchase the same amount in the relatively stable<sup>130</sup> British medium.<sup>131</sup> Over a fifteen year period, from 1744 to 1759, Rhode Island notes lost more than eighty percent of their value.<sup>132</sup> Over a much wider stretch of time, from 1720 until 1765—the year after Parliament’s Currency Act<sup>133</sup> became effective—Massachusetts currency inflated against sterling more than fourfold (all before 1750), and Rhode Island currency more than twelvefold.<sup>134</sup> Gresham’s Law holds that “bad money drives out good,”<sup>135</sup> and Gresham’s Law was sovereign in New England: specie essentially disappeared from daily trade.<sup>136</sup>

127. See MYERS, *infra* note 344, at 9.

128. See DODD, *infra* note 344, at 233 (claiming 30 years of stability). *But see* WRIGHT, *infra* note 344, at v (showing an inflation in Massachusetts currency between 1702 and 1722 of over one hundred percent).

129. THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES, ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), *reprinted in* 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152.

130. The stability of the pound sterling for a period of over three hundred years was “little short of a miracle,” for “the pound sterling, having been stabilized in 1560–61 by Elizabeth I, never thereafter varied, maintaining its intrinsic value until 1920 or indeed 1931.” BRAUDEL, *infra* note 344, at 356.

131. WRIGHT, *infra* note 344, at v.

132. *Id.* (showing that Rhode Island currency was worth £450 per £100 sterling in 1744, but had dropped to £2300 by 1759).

133. See *infra* Part II.B.2.

134. Weiss, *infra* note 344, at 778 tbl.2.

135. MARKHAM, *infra* note 344, at 85.

136. In 1740, a Boston writer called bills of credit “the only Money passing among us.” A LETTER RELATING TO A MEDIUM OF TRADE, IN THE PROVINCE OF THE MASSACHUSETTS-BAY (1740), *reprinted in* 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 3, 4; *see also* AN ENQUIRY INTO THE STATE OF THE BILLS OF CREDIT OF THE PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND: IN A LETTER FROM A GENTLEMEN IN BOSTON TO A MERCHANT IN LONDON (1743), *reprinted in* 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 149, 150 (saying of paper currency in

On the other hand, a pessimist might be pleasantly surprised by the more mixed record in the other colonies. Maryland and the Carolinas experienced significant inflation, but Virginia did not.<sup>137</sup> Nor did New York, New Jersey, or Pennsylvania. For example, over the forty-five year period from 1720 to 1765, Pennsylvania currency rose only twenty-nine percent against the pound sterling.<sup>138</sup> By comparison, the United States consumer price index rose 586 percent in the forty-five year period leading up to 2007.<sup>139</sup>

Professors Paul Studenski and Herman E. Krooss have summed up the colonial experience with paper money in this way:

The depreciation of colonial paper money has usually been exaggerated. Where the bills were used in moderation and not as substitutes for taxes to pay current expenses, and where the bank notes were issued cautiously and subject to rigid redemption, they did not have a bad history. Indeed, in seven colonies the experience was favorable while in the six others it was unfavorable.<sup>140</sup>

Amid this mixed record, one unmixed fact stands out: paper money was popular.<sup>141</sup> People were willing to accept the risks

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New England, that “for several Years past [it] has been the only *general Medium* of it’s [sic] Trade”); *A Few Remarks on the Present Situation of Affairs Respecting Silver and Paper Money*, WKLY. REHEARSAL, Apr. 1, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 129, 130–31 (stating that paper money was the dominant medium in all four New England states); THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152 (calling bills of credit “the only current Money of the Province [Massachusetts]”).

137. See MYERS, *infra* note 344, at 10–11.

138. Weiss, *infra* note 344, at 778. Virginia’s currency rose forty-one percent, and New York’s fifteen percent, against sterling. *Id.*

139. That is, the consumer price index rose from a base of 1.00 in 1962 to 6.86 in 2007. See Federal Reserve Bank of Minneapolis, Consumer Price Index Calculator, <http://www.minneapolisfed.org/Research/data/us/calc/> (last visited May. 24, 2008). Yet the American dollar is still considered one of the world’s most stable paper currencies.

140. STUDENSKI & KROOSS, *infra* note 344, at 16–17; see also WICKER, *infra* note 344, at 869 (concluding that during the French and Indian War, which lasted from 1755 to 1763, the paper currencies of New York, Pennsylvania, and South Carolina fared about as well as the specie-based standard of Massachusetts).

141. See, e.g., HUTCHINSON, *infra* note 344, at 392, 395, 437 (referring to the popularity of paper money); STUDENSKI & KROOSS, *infra* note 344, at 17 (“[T]he overwhelming majority of the colonists favored paper money and inflationary policies in general, regarding them as economically beneficial.”); GOVERNOR THOMAS HUTCHINSON COMMENTS ON MASSACHUSETTS BANKING AND BILLS OF CREDIT (1769), reprinted in BANKING AND CURRENCY, *infra* note 344, at 72, 82.

of inflation and the inconveniences of the lack of monetary uniformity<sup>142</sup> over the economic consequences of deflation.<sup>143</sup> As historian Mary M. Schweitzer observed of Pennsylvania, “paper money was virtually an ‘apple pie and motherhood’ issue throughout the colonial period.”<sup>144</sup>

Nor were the advocates of paper money all—or even mostly—radical redistributionists and demagogues. Many responsible Americans believed that paper money, when properly secured, was a sensible approach to the colonies’ need for liquidity. They believed that the colonies needed paper money to prevent the deflation that results when the supply of circulating media does not keep pace with a quickening economy.<sup>145</sup>

One paper money advocate was Benjamin Franklin, who while still a young man wrote *A Modest Enquiry in the Nature and Necessity of a Paper Currency*, in which he urged Pennsylvania to adopt a land-bank or loan-office system.<sup>146</sup> Franklin argued that, to a greater extent than in Europe, American assets consisted primarily of illiquid real estate, and to put those assets to work in the daily business of commerce they could be used to collateralize a circulating medium. Franklin continued to support paper emissions throughout his life, so long as such emissions were secured by valuable assets<sup>147</sup> and remained free of tender laws binding those from outside the issuing jurisdiction.<sup>148</sup> While serving in London as Pennsylvania’s colonial agent, Franklin published a pamphlet urging repeal of the 1764 Currency Act, which had imposed strict restraints on colonial paper.<sup>149</sup> Franklin’s views were shared by many others of great respectability,

142. Sometimes there were multiple currencies even within a single colony. MARKHAM, *infra* note 344, at 53.

143. See Sylla, *infra* note 344, at 22 (noting that the colonial experience supports the hypothesis of an inflationary bias in history).

144. Schweitzer, *infra* note 344, at 314.

145. *Id.* at 312.

146. BENJAMIN FRANKLIN, *A MODEST ENQUIRY INTO THE NATURE AND NECESSITY OF A PAPER CURRENCY* (1729), *reprinted in* 2 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 335. The pamphlet is also reproduced in BANKING AND CURRENCY, *infra* note 344, at 24–36. See *infra* notes 186–88 and accompanying text for a discussion of the land-bank or loan-office system.

147. FRANKLIN, *infra* note 344, at 220 (stating that paper money should be secured by tax revenue or land). Franklin opposed the issues of the Continental Congress because they did not bear interest. MARKHAM, *infra* note 344, at 60.

148. Letter from Benjamin Franklin to Louis-Guillaume Le Veillard (Feb. 17, 1788), *in* 16 DOCUMENTARY HISTORY, *infra* note 344, at 135, 136.

149. FRANKLIN, *infra* note 344; *see also infra* Part II.B.2 (discussing the Currency Act).

including Daniel Dulany, a distinguished essayist and lawyer,<sup>150</sup> and several of the King's colonial governors.<sup>151</sup>

*b. Mid-Century Reforms in New England*

British imperial authorities and their American allies were unsympathetic to colonial paper currency,<sup>152</sup> and made various efforts to control it.<sup>153</sup> For example, in 1749, when the British government shipped £183,000 in specie to Massachusetts to reimburse the colony for war expenses, Thomas Hutchinson, the conservative Speaker of the colony's House of Representatives, convinced the legislature to dedicate the specie to retire outstanding bills of credit.<sup>154</sup> In 1751, Parliament prohibited the colonies from issuing any further "Paper Bills or Bills of Credit, of any Kind or Denomination whatsoever" other than short-term tax anticipation notes and funding for emergencies.<sup>155</sup> Parliament also provided that no paper money in New England should be legal tender.<sup>156</sup>

Although three New England colonies somehow managed to issue paper after 1751, it was better secured and carried no legal tender status. Massachusetts and Connecticut labeled their new issues "treasury notes" rather than "bills of credit." In Massachusetts, they bore interest and were convertible into specie on

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150. Greene & Jellison, *infra* note 344, at 490; see also Edward C. Papenfuse, *Daniel Dulany (1722–1797): Politician in America*, 17 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 172 (2004).

151. Greene & Jellison, *infra* note 344, at 491 (referencing Governor Fauquier of Virginia); *id.* at 493 (referencing Governor Sharpe of Maryland); *id.* at 494 (referencing Governor Moore of New York).

152. See *id.* at 486.

153. See NEWMAN, *infra* note 344, at 11–12 (describing British efforts to curb paper money in the first half of the century and the struggle between colonial assemblies and royal governors); Greene & Jellison, *infra* note 344, at 486 (discussing a circular instruction to royal governors in 1720 and a parliamentary statute of 1741); see also BANKING AND CURRENCY, *infra* note 344, at 20–23 (reprinting documents describing the struggle over the size of a paper money emission between the Pennsylvania House of Representatives and the Royal Governor, a struggle the Governor lost).

154. See HUTCHINSON, *infra* note 344, at 435–40, for a discussion of the process by one of the participants. See also Governor Thomas Hutchinson *Comments on Massachusetts Banking and Bills of Credit*, (1769), reprinted in BANKING AND CURRENCY, *infra* note 344, at 72, 81–84 (providing another account).

155. STAT. AT LARGE, 24 Geo. ii, c. 53 (1751).

156. *Id.* § vii.

demand.<sup>157</sup> In Connecticut, they also bore interest.<sup>158</sup> Rhode Island continued to emit "bills," but they were convertible into specie within two years of issue.<sup>159</sup>

## 2. *The Currency Act of 1764 and Aftermath*

In 1764, Parliament adopted an act addressing the colonies' paper bills of credit, now known as the Currency Act of 1764.<sup>160</sup> This measure extended the ban on issuance of legal tender paper currency from New England to all American colonies.<sup>161</sup> The immediate effect was significant deflation<sup>162</sup> that eventually fostered considerable colonial resentment.<sup>163</sup> Feelings had been deteriorating for some time, and continued to erode as older currencies were retired and the British rejected several substitutes for maintaining liquidity.<sup>164</sup> Moreover, the colonists were frustrated by the British government's fragmentation of responsibility for American policy among Parliament, the Privy Council, the Secretary of State for the Southern Department, and the sixteen Lords Commissioners of Trade and Plantations

157. Smith, *infra* note 344, at 6 (outlining the Massachusetts reforms). These treasury notes were a form of tax anticipation note, payable with interest and in specie after two or three years. Wicker, *infra* note 344, at 872.

158. NEWMAN, *infra* note 344, at 68 (reproducing a 1770 Connecticut interest-bearing "treasury note").

159. *Id.* at 288 (reproducing a 1767 Rhode Island bill convertible into specie within two years).

160. STAT. AT LARGE, 4 Geo. iii, c. 34 (1763). Parliament later allowed colonies to issue bills for taxes and debts due to the colonies themselves, but the bills were not to be used for private debts. MARKHAM, *infra* note 344, at 56.

161. DODD, *infra* note 344, at 236.

162. Based on a factor of 100 for the year 1720, the Philadelphia exchange rate with the pound sterling dropped from 129 in 1765 to 115 in 1770, but then rose to 127 in 1774. The comparable figures for Virginia were 141, 104, and 113. Weiss, *infra* note 344, at 778.

163. See MARKHAM, *infra* note 344, at 56.

164. See, e.g., Greene & Jellison, *infra* note 344, at 502–03 (discussing the retirement of old currency in New York and the British refusal to allow new currency to take its place); see also BANKING AND CURRENCY, *infra* note 344, at 87 (stating that the colonists "objected bitterly to the Crown's refusal to permit an expanded money supply"); DODD, *infra* note 344, at 237–38 (stating that the British intervention throughout the first half of the eighteenth century fed American resentment against the British authorities); MYERS, *infra* note 344, at 11 (referring to anger at British-imposed restrictions on the use of paper money); STUDENSKI & KROOSS, *infra* note 344, at 17 (contending that "Franklin was correct in listing the British anti-inflation policy among the five factors which lessened the colonial respect for Parliament and led to the Revolution").

("Board of Trade").<sup>165</sup> One effect of this fragmentation was that the imperial government had difficulty defining the boundaries of the Currency Act.<sup>166</sup>

Most of the colonies attempted to cobble together ways of supporting their currencies without legal tender laws. Pennsylvania, for example, issued non-legal tender notes secured by previously-issued legal tender notes.<sup>167</sup> But none of these expedients proved wholly satisfactory.<sup>168</sup> Finally, in 1773, Parliament granted to all the colonies a concession it earlier had granted only to New York. It permitted the colonies to issue tax-anticipation bills that constituted legal tender only for public obligations, including payments to governmental land-banks.<sup>169</sup> The same year, the British further sought to ease the colonial specie shortage by striking a copper half-penny for Virginia.<sup>170</sup> By that time, however, it probably was too late to rescue the trans-Atlantic relationship.

### 3. *Kinds of American Paper Money*

Legal writers—as opposed to economic historians—seem almost universally to have made the error of assuming that the constitutional phrase "Bills of Credit"<sup>171</sup> was a mere synonym

165. For a discussion of these institutions, see MARKHAM, *infra* note 344, at 34, and ESMOND WRIGHT, *FABRIC OF FREEDOM: 1763–1800*, at 27 (rev. ed. 1978). For an example of colonial frustration, see MARKHAM, *infra* note 344, at 57 (referring to the struggle between the Board of Trade and South Carolina over the use of paper and commodities as money). See also Greene & Jellison, *infra* note 344 (describing the British-American tug-of-war over the currency).

Although the Board of Trade was influenced heavily by mercantile interests, it could only advise the other responsible parties, a system that became even more confused with the creation of the post of Secretary of State for American Affairs in 1768. WRIGHT, *supra*, at 27–31. British colonial decision making among these and other agencies was uncoordinated, thereby adding to American frustration. See *id.*

166. See Greene & Jellison, *infra* note 344, at 505; see also *supra* note 164 (discussing the lack of coordination among British agencies). Instructions to royal governors regarding permissible currency sometimes were subject to different interpretations. In Massachusetts, for example, governors had instructions not to approve a "depreciating" currency, but could interpret this to approve or disapprove various kinds of paper emissions. See, e.g., HUTCHINSON, *infra* note 344, at 402–03.

167. See NEWMAN, *infra* note 344, at 249 (reproducing two such bills of credit, issued in 1769).

168. Greene & Jellison, *infra* note 344, at 504–14.

169. *Id.* at 514–17; see NEWMAN, *infra* note 344, at 253 (reproducing a Pennsylvania land-office bill issued in 1773).

170. See *The Virginia Half Penny of 1773: Introduction*, <http://www.coins.nd.edu/ColCoin/ColCoinIntros/VA-halfd.intro.html> (last visited May 25, 2008).

171. U.S. CONST. art. I, § 10, cl. 1.

for paper money.<sup>172</sup> In fact, bills of credit constituted only the most important of several categories of American paper currency. The name of this kind of currency probably was inspired by private bills of credit, which were instruments executed by an issuer to a potential creditor, informing the potential creditor that if he (i) extended credit to an identified potential debtor (often the issuer's agent), and (ii) delivered to the issuer the debtor's written acknowledgment of the debt, then the issuer would hold the potential creditor harmless.<sup>173</sup> A paper-money bill of credit was analogous to its private counterpart in that the issuing government gave the instrument to one of its creditors to assure the creditor that if he extended credit to his fellow citizens (potential debtors), then he (the creditor) would be held harmless. The government promised to discharge this obligation by future payment or by accepting the bill in lieu of future taxes or other fees.<sup>174</sup> The paper-money bill of credit, however, differed from its private-party analogue in that the public bill was intended to circulate as currency,<sup>175</sup> and the bearer presented the same document, rather than a separate document executed by the debtor, when seeking payment.

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172. Compare Harlow, *infra* note 344, at 63 ("Then there were all the varieties of state paper: bills of credit, treasurer's notes, and almost no end of certificates."), with Kemmerer, *infra* note 344, at 867 (distinguishing loan-office bills from bills of credit). See also *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830) (holding, per Marshall, C.J., over the dissents of three Justices, that loan office certificates were bills of credit for constitutional purposes); FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876*, at 128 (2000) (noting that the holding was "technically questionable, because loan office certificates were historically quite different from bills of credit").

173. 4 COMYNS, *infra* note 344, at 239 ("A Bill of Credit is, when a Merchant sends a Letter by a Servant, or Agent to another Merchant, within the Realm, or in foreign Parts, whereby he desires him to give Credit to the Bearer for Goods or Money, to such a Value."). Many form-books provided the eighteenth-century lawyer or businessman with forms for bills of credit. See, e.g., 1 ANONYMOUS, *THE ATTORNEY'S COMPLEAT POCKET-BOOK* 113 (5th ed. 1764); 1 NICHOLAS COVERT, *THE SCRIVENER'S GUIDE* 305-06 (4th ed. 1724); H. CURSON, *ARCANA CLERICALIA; OR, THE MYSTERIES OF CLERKSHIP EXPLAINED* 450-51 (1705).

174. This promise is why the bill-of-credit powers in the initial drafts of both the Articles of Confederation and the Constitution were associated with the borrowing power. See *infra* note 231 (reproducing the clause in the Committee of Detail's original draft of the Constitution).

175. HUGH VANCE, *AN INQUIRY INTO THE NATURE AND USES OF MONEY*, in 3 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 365, 432 (1740) (arguing that the name "Bill of Credit" is not appropriate, because after the first emission, the bills were issued intending them to be money).

How a colony labeled its currency did not necessarily control whether that currency was actually a bill of credit. The "treasury notes" issued by Connecticut and Massachusetts after mid-century<sup>176</sup> were not legal tender, but they were bills of credit in all but name.<sup>177</sup> Some forms of paper money, on the other hand, were clearly not bills of credit. The Virginia and Maryland "tobacco notes," although generally serving as legal tender, were classic warehouse receipts.<sup>178</sup> In contrast, the "bills" issued by a land-bank—an institution discussed below<sup>179</sup>—were not actually bills of credit: bills of credit represented the government's indebtedness to citizens; land-bank bills represented citizens' indebtedness to the government.<sup>180</sup>

Both bills of credit and other forms of paper money could be secured or unsecured. For instance, Maryland's "indented bills" of 1733 were collateralized by stock in the Bank of England.<sup>181</sup> Other instruments were backed by commodities such as lum-

176. See *supra* notes 157–58 and accompanying text.

177. Harlow, *infra* note 344, at 49 (stating that "there was little valid difference" between treasury notes and bills of credit during the Revolutionary War). Currency that appears on its face to be pure legal tender fiat money rather than a governmental debt was sometimes labeled a "bill of credit." See, e.g., NEWMAN, *infra* note 344, at 239 (reproducing a 1744 Pennsylvania fiat note apparently called a "bill of credit"). Many or most of those "bills of credit," were actually redeemable under the terms of their issue, and therefore did represent a governmental debt. See, e.g., *id.* at 206–07 (reproducing redeemable New York bills of credit); *id.* at 324 (reproducing a redeemable Vermont bill of credit). Moreover, even a non-redeemable legal tender bill represented a government obligation insofar as it could be used to pay taxes and other government charges.

178. See MARKHAM, *infra* note 344, at 45 (stating that tobacco notes were a kind of warehouse receipt, that they were legal tender in Virginia before 1717 and again after 1730, and that similar receipts were also "passed as money" in Maryland); DODD, *infra* note 344, at 235 (describing the tobacco warehouse receipt system); MYERS, *infra* note 344, at 4 (same); NEWMAN, *infra* note 344, at 13 (same). A Virginia tobacco note currently in the Library of Virginia is clearly a receipt, with indications of the quantity and quality of tobacco deposited, although it also represents that the issuer will deliver, on demand, the tobacco to the depositor or to his order. A warehouse receipt tobacco note should not be confused with other notes, also issued by Virginia, promising to pay soldiers in tobacco upon their discharge. See, e.g., NEWMAN, *infra* note 344, at 343.

In Maryland, official certificates of tobacco inspection were also intended to and did pass as money. MARKHAM, *infra* note 344, at 45; Mary McKinney Schweitzer, *Economic Regulation and the Colonial Economy: The Maryland Tobacco Inspection Act of 1747*, 40 J. ECON. HIST. 551, 555–57, 563–64 (1980).

179. See *infra* notes 186–88 and accompanying text.

180. See Kemmerer, *infra* note 344, at 867 (distinguishing land-bank bills from bills of credit). These bills should not be confused with those bills of credit in which the government used part of the proceeds of emission to make real estate loans. See, e.g., NEWMAN, *infra* note 344, at 253 (reproducing such bills of credit).

181. See NEWMAN, *infra* note 344, at 111.

ber.<sup>182</sup> A less tangible form of security—if it was security at all—backed the first Massachusetts bills of credit. Those bills entitled the bearer to remit them for payments due at the colonial treasury, most likely for tax payments.<sup>183</sup> Each bill specified its denomination and proclaimed that it “shall be in value equal to money & shall be accordingly accepted by the Treasurer . . . in all publick payments and for any Stock at any time in the Treasury.”<sup>184</sup> Most other early colonial issues, especially those in New England, followed the same general formula.<sup>185</sup> If the issue were legal tender, the phrase “and all others” might be inserted on the bill after the word “Treasurer.”<sup>186</sup>

Most colonies also experimented with the “land-bank” or “loan-office” system, in which a landowner granted the government a real estate mortgage as collateral and in exchange received a loan of government paper currency.<sup>187</sup> Thus, the loan office turned illiquid real-estate assets into, as Benjamin Franklin wrote, “Coined Land.”<sup>188</sup> Land-banks sometimes issued currency in exchange for inadequate or improper collateral, thereby contributing to inflation of paper money.<sup>189</sup>

The terms of repayment of paper money also varied. An emission might promise payment in specie or some other asset on demand, or it might provide for remittance after a date, fixed<sup>190</sup> or variable,<sup>191</sup> or tied to future tax receipts.<sup>192</sup> Some cur-

182. MARKHAM, *infra* note 344, at 49 (describing a failed effort).

183. NEWMAN, *infra* note 344, at 7 (describing the first Massachusetts emission).

184. *Id.* at 124.

185. *See, e.g., id.* at 51, 158, 197 (reproducing bills from Connecticut, New Hampshire, and New York).

186. *See, e.g., id.* at 88 (reproducing a Georgia bill).

187. *See, e.g.,* Kemmerer, *infra* note 344, at 874 (discussing the land-bank in New Jersey); Theodore Thayer, *The Land-Bank System in the American Colonies*, 13 J. ECON. HIST. 145, 145 (1953) (“Land banks were established in most of the American colonies during the first half of the eighteenth century.”). The quality of the collateral was sometimes open to debate. *Compare A Letter from a Gentleman in Rhode-Island to his Friend in Boston*, WKLY. REHEARSAL, Feb. 18, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 35, 37 (asserting that Rhode Island paper was effectively secured by land), with *To the Author of the Weekly Rehearsal*, WKLY. REHEARSAL, Mar. 4, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 61, 62–63 (disputing that assertion).

188. FRANKLIN, *supra* note 146, at 349.

189. HUTCHINSON, *infra* note 344, at 392–96 (discussing the land-bank experience in Massachusetts).

190. *See, e.g.,* NEWMAN, *infra* note 344, at 224–25 (reproducing three North Carolina bills with fixed payment dates); *id.* at 295 (reproducing a 1780 Rhode Island bill of credit redeemable in Spanish milled dollars on Dec. 31, 1786).

rency bore interest, and some did not.<sup>193</sup> Currency, whether or not in the form of bills of credit, might or might not be legal tender.<sup>194</sup> Some was pure fiat money, like the modern Federal Reserve note, promising nothing but stating on its face merely that it was "Lawful Money"<sup>195</sup> or "shall pass current" at a denominated amount.<sup>196</sup>

### C. Revolutionary War Emissions

Armed revolution erupted in the spring of 1775. The Continental Congress decided to issue bills of credit worth two million Spanish-milled dollars to finance the cause.<sup>197</sup> There were several reasons for this decision. First, Congress had the power to issue bills of credit but no authority to raise money through taxation.<sup>198</sup> Second, the states did not pay the full amount of congressional requisitions but rather competed

191. See, e.g., *id.* at 95 (reproducing two 1775 Georgia bills "to be called in and provided for within three Years after a Reconciliation between Great Britain and America shall take place").

192. See, e.g., *id.* at 309 (reproducing a 1774 South Carolina bill).

193. See, e.g., *id.* at 217 (reproducing a 1780 New York bill). Professor Kenneth W. Dam argued that bills of credit were distinguished from "notes" in that bills of credit paid no interest and notes did, and that Madison understood the distinction in this way. Dam, *infra* note 344, at 387–88. This argument is incorrect: Both "bills of credit" and "notes" came in interest-bearing and interest-free varieties. See, e.g., NEWMAN, *infra* note 344, at 152, 217, 264 (reproducing a 1780 Massachusetts bill of credit that paid five percent interest, a 1780 New York bill of credit that paid five percent interest, and a 1783 Pennsylvania note, redeemable in specie, but paying no interest). Madison's own state of Virginia issued both interest-bearing and non-interest-bearing treasury notes. *Id.* at 432–33 (referencing four Virginia treasury notes with interest and reproducing three Virginia treasury notes without interest).

194. Compare *id.* at 239 (reproducing 1744 and 1746 Pennsylvania bills of credit that were legal tender), with *id.* at 249 (reproducing 1769 Pennsylvania bills of credit that were not legal tender), and *id.* at 341 (reproducing 1779 Virginia "Treasury Bills," redeemable in gold, that were issued without legal tender status but were later given that status).

195. See, e.g., *id.* at 302 (reproducing a 1731 South Carolina bill).

196. See, e.g., *id.* at 179–94 (surveying New Jersey money, most of which provided that it "shall pass current"); *id.* at 205 (setting forth New York samples issued in 1734 and 1737); *id.* at 223 (reproducing a sample of 1748 North Carolina "Proclamation Momy").

197. See *id.* at 30–42 (reproducing facsimiles of continental currency issued under each congressional resolution).

198. See DODD, *infra* note 344, at 239–40 (referring to Congress's difficulties with instituting taxes).

with Congress for European loans.<sup>199</sup> Third, as noted above, paper money was popular.<sup>200</sup>

Congress soon issued more bills of credit. By 1778, continental issues had grown to \$30 million; by 1779 to \$150 million; and by 1780 to \$240 million.<sup>201</sup> This was in addition to about \$200 million in paper emitted by the states.<sup>202</sup> In 1776, Congress asked the states to make congressional bills legal tender, that is, to force people to take them at face value.<sup>203</sup> Most states complied.<sup>204</sup>

Beginning in 1777, despite the state tender laws, continental currency depreciated precipitously.<sup>205</sup> So Congress resorted to general price controls, which enjoyed the same level of success such measures always do—little or none.<sup>206</sup> Finally in March 1780, with continentals good for about two and one-half cents on the dollar, Congress gave up “the pretence that notes were on par with coin.”<sup>207</sup> Congress stopped issuing paper money<sup>208</sup> and issued an announcement euphemistically declaring almost

199. *See id.* at 246.

200. *See supra* notes 141–51 and accompanying text.

201. MARKHAM, *infra* note 344, at 61; *see also* BANKING AND CURRENCY, *infra* note 344, at 89 (editor’s commentary) (giving another account of congressional paper money emissions).

202. MYERS, *infra* note 344, at 28. States gradually stopped issuing paper at the request of Congress. *Id.*

203. MARKHAM, *infra* note 344, at 67–68; *see also* BANKING AND CURRENCY, *infra* note 344, at 105–06 (setting forth proposed resolution in committee report).

204. DODD, *infra* note 344, at 242.

205. BANKING AND CURRENCY, *infra* note 344, at 153–54 (setting forth “Scales of Depreciation of Continental Money”); *see also* Harlow, *infra* note 344, at 54–57 (describing various methods, some quite draconian, through which the states and Congress tried to halt depreciation and counterfeiting).

206. Commentators agreed on the ineffectiveness of this measure, even though price controls were occasionally enforced through vigilante action. *See* MARKHAM, *infra* note 344, at 67; MYERS, *infra* note 344, at 29; STUDENSKI & KROOSS, *infra* note 344, at 28. Interestingly, the colonies had suffered poor experiences with such controls, so perhaps they should have known better. *See* MARKHAM, *infra* note 344, at 35 (referring to the maximum price on rum in the Carolinas in 1673).

Congress abandoned price controls in 1780. In November of that year, however, Congress urged the states to impose a six-million dollar goods tax, a levy payable in-kind, with even worse results. DODD, *infra* note 344, at 246. Congress also tried, unsuccessfully, to raise money through a lottery, MARKHAM, *infra* note 344, at 61; and drew bills of exchange on its cashless representatives in France, *id.* at 61–62.

207. *See* DODD, *infra* note 344, at 245; MARKHAM, *infra* note 344, at 66–68.

208. *See* 13 DOCUMENTARY HISTORY, *infra* note 344, at 12 (editor’s note).

total default.<sup>209</sup> Fortunately, by May 1781, specie was again in circulation courtesy of French monetary imports.<sup>210</sup>

It is easy to condemn the Continental Congress's venture into hyperinflation, but difficult to see how Congress could have financed the Revolution otherwise. At the time, many people did not see the episode as a failure at all. The liquidity was received favorably (at least at first), and the depreciation was seen as an informal tax for financing the war.<sup>211</sup> And, of course, the war had been won.

#### D. The Confederation Era

Congress approved the Articles of Confederation in 1777, although they did not become effective until the thirteenth state (Maryland) ratified them in 1781.<sup>212</sup> The Articles gave Congress "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States [and] fixing the standards of weights and measures throughout the United States."<sup>213</sup> Congress also received authority to "emit bills on the credit of the United States."<sup>214</sup>

The Confederation Congress declined to exercise this power, but during the period the Articles were in effect (from March 1, 1781 to June 21, 1788) ten of the states did, in fact, emit paper money.<sup>215</sup> The experience in some of the states was good. South

209. See DODD, *infra* note 344, at 247-48.

210. MYERS, *infra* note 344, at 28. Continental paper no longer circulated as currency after May 31, 1781. BANKING AND CURRENCY, *infra* note 344, at 154.

211. STUDENSKI & KROOSS, *infra* note 344, at 28; BANKING AND CURRENCY, *infra* note 344, at 88 (editor's commentary).

212. 19 J. CONT. CONG. 213-23 (Mar. 1-2, 1781).

213. ARTS. CONFED. art. IX.

214. *Id.*

215. For example, Georgia issued new sets of bills in 1782 and 1786, NEWMAN, *infra* note 344, at 107; Maryland in 1781, *id.* at 141; Massachusetts in 1781, *id.* at 157 (in addition to Massachusetts bank issues); New Jersey in 1781, 1784, and 1786, *id.* at 221; New York in 1781, 1786, and 1788, *id.* at 243; North Carolina in 1781, 1783, 1785, *id.* at 287; Pennsylvania in 1781, 1783, and 1785, *id.* at 325; Rhode Island in 1786, *id.* at 365; and South Carolina in 1786, 1787, and 1788, *id.* at 399. Avoiding issues during this period were Connecticut, *id.* at 65; Delaware, *id.* at 95; and New Hampshire, *id.* at 197.

State constitutions did not explicitly grant states the power to issue paper money, but some of them contained clauses assuming that the states had, or would continue to exercise, that power. See, e.g., N.J. CONST. arts. III & IV (1776), (referring to "proclamation money," paper currency with legal tender status).

Carolina notes were not legal tender,<sup>216</sup> yet they were well-backed and traded at a premium.<sup>217</sup> Depreciation was mild in New York.<sup>218</sup> In other states, such as North Carolina and, most notoriously, Rhode Island, inflation was severe.<sup>219</sup>

During this period many people became concerned that state-level paper money emissions might trigger interstate trade wars. In 1786, Rhode Island issued paper money at least partly to relieve resident debtors pressed by out-of-state creditors. This money depreciated quickly. Two years later, debtors could escape for as little as ten cents on the dollar.<sup>220</sup> To ensure that creditors accepted this currency, the legislature passed a law declaring that anyone who refused to do so could be fined without benefit of trial by jury.<sup>221</sup>

Debtors from other states owing money to Rhode Island creditors decided they could play the same game. When sued in Rhode Island courts, out-of-state debtors tendered Rhode Island paper money. The outraged Rhode Island legislature responded by ordering state judges to refuse to recognize any such tender from a debtor who was not a Rhode Island resident. Connecticut lawmakers thereupon provided that Rhode Islanders could not collect debts in Connecticut until its neighbor repealed the discriminatory statutes against non-residents.<sup>222</sup> Such struggles between states later became fodder for the ratification debates.<sup>223</sup>

### E. *The Constitutional Convention*

#### 1. *Why a Coinage Clause Was Necessary*

Extant comments by James Wilson and James Madison suggest that they believed the states were incompetent to handle the coinage power and that it should be lodged in the federal

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216. See, e.g., S.C. Pub. L. No. 1258 (1782), THE PUBLIC LAWS OF SOUTH CAROLINA (1790) (stating that no paper money should be legal tender).

217. MYERS, *infra* note 344, at 40.

218. Rolnick et al., *infra* note 344, at 4.

219. *Id.*

220. *Id.*

221. JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN 58–59 (1787), (setting forth statute denying jury trial when accused of refusing tender).

222. 9 DOCUMENTARY HISTORY, *infra* note 344, at 1005–06 (editor's note 19).

223. See *infra* notes 306, 329, 330, and accompanying text.

government.<sup>224</sup> Assuming that delegates to the Constitutional Convention generally held this belief, one might ask why convention delegates enumerated a specific coinage power when by common understanding congressional authority over commerce<sup>225</sup> would include authority over measures and money as well.<sup>226</sup> The Articles of Confederation included express powers over measures and money but only because the Articles granted Congress no general power over commerce.

One possibility is that the delegates chose to include a specific coinage power because the congressional commerce power did not extend to some commerce. Excluded was commerce that was neither foreign, nor interstate, nor with the Indian tribes, nor "necessary and proper" to regulate in pursuit of an enumerated power. Moreover, some activities benefiting from standard measurements, such as manufacturing and agriculture, were not "commerce" at all in the contemporaneous sense of the word.<sup>227</sup> Including a separate power "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures"<sup>228</sup> enabled Congress to set measurement standards for all transactions within the United States.<sup>229</sup>

224. See 1 FARRAND, *infra* note 344, at 331 (reporting the notes of Rufus King, who recorded Wilson as saying: "Coinage. P. Office &c [the States] are wholly incompetent to the exercise of any of the Gt. & distinguishing acts of Sovereignty"); *id.* at 413 (reporting the notes of Robert Yates, who recorded Wilson as saying, "We have unanimously agreed to establish a general government - That the powers of peace, war, treaties, coinage and regulating of *commerce*, ought to reside in that government. And if we reason in this manner, we shall soon see the impropriety of admitting the interference of state governments into the general government"); *id.* at 446 (reporting the notes of Madison, who recorded himself as arguing that foreign governments would not take seriously a mere league of states, "each with authority and discretion, to raise money, levy troops, determine the value of coin &c").

225. U.S. CONST. art. I, § 8, cl. 3.

226. See *supra* notes 61, 67-69, and accompanying text.

227. See *supra* note 58 and accompanying text. One could, of course, argue that the King's general commerce power enabled him to control the measurements used in non-commercial transactions, so Congress's limited commerce power should enable it to reach non-commercial transactions with interstate implications. If the Framers thought of this argument at all, they no doubt wished to forestall such quibbles.

228. U.S. CONST. art. I, § 8, cl. 5.

229. Cf. THE FEDERALIST NO. 42, *infra* note 344, at 271-72 (James Madison):

All that need be remarked on the power to coin money, regulate the value thereof, and of foreign coin, is, that by providing for this last case, the Constitution has supplied a material omission in the articles of Confederation. The authority of the existing Congress is restrained to the regulation of coin *struck* by their own authority, or that of the respective

2. *What the Convention Records Have To Say  
About Paper Money*

It is probable that most of the delegates at the federal Convention were hostile to paper money. They were particularly hostile to state emissions of paper money, which accounts for their adopting an express ban on state bills of credit and tender laws.<sup>230</sup> This does not, however, answer the question whether most of them intended to deprive the new federal government of the power to emit paper money.

The Convention first laid down a series of resolutions governing the content of the Constitution, and then delegated the job of producing the first draft to a Committee of Detail. That committee consisted of five members. They included Nathaniel Gorham of Massachusetts, a merchant and former President of Congress, and four distinguished lawyers: Edmund Randolph of Virginia, John Rutledge of South Carolina, James Wilson of Pennsylvania, and Oliver Ellsworth of Connecticut.<sup>231</sup> On August 6, 1787, the committee presented its draft to the whole Convention, which debated, supplemented, and amended it over the next few weeks. Those seeking the original meaning of the Constitution regarding paper money have focused much attention on the notes taken by James Madison on August 16, one of the days on which the delegates were picking apart the committee's draft.<sup>232</sup>

States. It must be seen at once that the proposed uniformity in the *value* of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States. . . . The regulation of weights and measures is transferred from the articles of Confederation, and is founded on like considerations with the preceding power of regulating coin.

230. U.S. CONST. art. I, § 10, cl. 1; see 2 FARRAND, *infra* note 344, at 439 (reporting Madison's notes on the Convention debate over the denial of monetary powers to the states).

231. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 269–71 (2004) (discussing the selection and careers of the committee's members).

232. See 2 FARRAND, *infra* note 344, at 308–10. Madison's record is as follows:

Mr. Govr Morris moved to strike out "and emit bills on the credit of the U. States"—If the United States had credit such bills would be unnecessary: if they had not unjust & useless.

Mr Butler, 2ds. the motion.

Mr. Madison, will it not be sufficient to prohibit the making them a *tender*? This will remove the temptation to emit them with unjust views. And promissory notes in that shape may in some emergencies be best.

Mr. Govr. Morris. striking out the words will leave room still for notes of a *responsible* minister which will do all the good without the mischief.

That draft included a congressional power “[t]o borrow money, and emit bills on the credit of the United States.”<sup>233</sup> The

The Monied interest will oppose the plan of Government, if paper emissions be not prohibited.

Mr. Ghorum was for striking out, without inserting any prohibition. if the words stand they may suggest and lead to the measure.

Col Mason had doubts on the subject. Congs. he thought would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet as he could not foresee all emergencies, he was unwilling to tie the hands of the Legislature. He observed that the late war could not have been carried on, had such a prohibition existed.

Mr Ghorum—The power as far as it will be necessary or safe, is involved in that of borrowing.

Mr Mercer was a friend to paper money, though in the present state & temper of America, he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the Government to deny it a discretion on this point. It was impolitic also to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of Citizens

Mr. Elseworth thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made, were now fresh in the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new Governnt. more friends of influence would be gained to it than by almost any thing else—Paper money can in no case be necessary—Give the Government credit, and other resources will offer—The power may do harm, never good.

Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.

Mr Wilson. It will have a most salutary influence on the credit of the U. States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered. And as long as it can be resorted to, it will be a bar to other resources.

Mr. Butler. Remarked that paper was a legal tender in no Country in Europe. He was urgent for disarming the Government of such a power.

Mr Mason was still averse to tying the hands of the Legislature *altogether*. If there was no example in Europe as just remarked it might be observed on the other side, that there was none in which the Government was restrained on this head.

Mr. Read, thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.

Mr. Langdon had rather reject the whole plan than retain the three words “(and emit bills”).

On the motion for striking out

N. H. ay- Mas. ay. Ct. ay. N-J. no. Pa. ay. Del. ay. Md. no. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—9; noes—2.]

*Id.* (footnotes omitted).

233. *Id.* at 182.

discussion on paper money began when Gouverneur Morris moved to strike the language: "emit bills on the credit of the United States." His reason, apparently, was that this phrase would wave a red flag before some of the Constitution's potential supporters, and it would do so needlessly, for officials in the future government could find ways to borrow money without resorting to bills of credit.<sup>234</sup>

Eleven delegates spoke in the debate on the Morris proposal.<sup>235</sup> In the ensuing state-by-state vote, nine states voted for the motion to remove the bill of credit language, and two states voted against it.<sup>236</sup> This vote is sometimes cited as showing intent to deny the federal government the power to issue paper money. The records of the debate, however, demonstrate that the delegates who voted for the motion did so for varying reasons. Some probably believed that they were banning paper currency; others thought that the federal government would be able to issue such currency without the bill-of-credit language, but wanted to remove it to avoid offending potential ratifiers or encouraging Congress to emit paper money needlessly.<sup>237</sup> Taking the discussion as a whole into consideration, one can infer no more than the following:

- All of those voting to retain the language explicitly authorizing federal bills of credit did so because they believed (i) the federal government should have the power to issue bills of credit; and (ii) deleting the language would delete the power.<sup>238</sup>
- Some voting to delete the language believed (i) the federal government should *not* have the power to issue bills of

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234. *Id.* at 308–09.

235. *Id.* at 310.

236. *Id.*

237. *See, e.g., id.* at 309 (reporting Gouverneur Morris as saying: "The Monied interest will oppose the plan of Government, if paper emissions be not prohibited."); *id.* ("Mr. Ghorum was for striking out, without inserting any prohibition. if the words stand they may suggest and lead to the measure."); *id.* at 310 ("Mr. Read, thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.").

238. This would, of course, be the principal reason to vote against deletion. The identity of exactly who voted which way within their state delegations is not fully known, and only eleven of fifty-five delegates spoke to the issue. Mercer and Randolph, however, were probably among this first group.

- credit; and (ii) deleting the language would delete that power.<sup>239</sup>
- Others voting to delete the language believed (i) the federal government should have the power to issue bills of credit; but (ii) deleting the language would *not* delete that power. This final group voted to delete because they saw the committee's language as superfluous and imprudent.<sup>240</sup>

James Madison seems to have been in his own category. He thought (i) the federal government ought to have the power to issue paper money, but only if it were not legal tender; and (ii) deleting the language would achieve this result.<sup>241</sup> Madison voted for the motion because, he said,

[he] became satisfied that striking out the words would not disable the Govt from the use of public notes as far as they could be safe & proper; & would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or private debts.<sup>242</sup>

Madison's interpretation is not fully accurate, however, because "notes" could and did serve as "paper currency," and whether or not an item was a "bill of credit" was not determinative of its legal tender status.<sup>243</sup> It is possible that the "notes" Madison was thinking of were Massachusetts treasury notes, which were not legal tender, but which bore interest and were convertible on demand into specie.<sup>244</sup> Those notes, however, certainly served as paper currency.<sup>245</sup>

In addition to the variation in delegates' views, another reason the import of the Convention discussion is unclear is because we do not know how many delegates thought a ban on "bills of credit" would be equivalent to a ban on all paper money. As noted earlier, the phrase "bill of credit" was, techni-

239. Wilson and Butler were probably in this group.

240. Ghorum was probably among this category of delegates. Morris, Mercer, and Read all mentioned considerations of public acceptability, and Read may or may not have been in this group.

241. 2 FARRAND, *infra* note 344, at 310.

242. *Id.*

243. See *supra* note 194 and accompanying text.

244. See *supra* note 157 and accompanying text.

245. See Smith, *infra* note 344, at 4-5.

cally, only one kind of paper money—a circulating instrument representing a government debt.<sup>246</sup>

The proceedings of the Committee of Detail are relevant to this issue. At the outset of the committee's work, Randolph was assigned to write an initial draft, which Rutledge then revised. With Rutledge's additions italicized and anonymous deletions struck through, the coinage power looked like this:

To ~~regulate~~ *The exclusive right of coining money* ~~Paper prohibit~~  
*no State to be perd. in future to emit Paper Bills of Credit witht.*  
*the App: of the Natl. Legisle nor to make any Article Thing but*  
*Specie a Tender in paymt of debts*<sup>247</sup>

Thus, Randolph initially provided for a congressional power "To regulate coining," but Rutledge changed this to "coining money" and added the words "Paper prohibit." Rutledge also added the conditional ban on state "Paper Bills of Credit." The difference in the phrases "Paper prohibit" and "Bills of Credit" suggests that the Committee might not have considered the two to be synonymous. Certainly, the Committee's coupling of the proposed federal bill of credit power with the borrowing power<sup>248</sup> suggests that it understood the specialized debt-representation aspect of bills of credit, as opposed to other forms of paper currency.<sup>249</sup>

Moreover, Rutledge's placement of "Paper prohibit" suggests that he thought of this phrase as a qualification on the coining power, which in turn suggests that one could coin paper. Interestingly, the Committee decided to delete Rutledge's proposed prohibition of federal paper money.<sup>250</sup> Even though the Convention later dropped the Committee's federal bill of credit language, it never restored Rutledge's proposed prohibition. Thus, to the argument that the Convention's deletion of the bill of credit power implied a loss of that power, one can counter that deletion of the ban on federal paper money implied a removal of that ban.

246. See *supra* notes 171–86 and accompanying text.

247. Committee of Detail Proceedings, in 2 FARRAND, *infra* note 344, at 144.

248. See *supra* notes 233–34 and accompanying text.

249. See 2 FARRAND, *infra* note 344, at 182 (reporting the bill of credit provision as "To borrow money, and emit bills on the credit of the United States"); see also *supra* text accompanying note 233–34.

250. We know that at least one other member of the Committee—Edmund Randolph—favored, albeit reluctantly, giving Congress the power to emit paper. See 2 FARRAND, *infra* note 344, at 310.

Fundamentally, however, the Committee's transactions are ambiguous, because one can construct a plausible "metallist" interpretation of them. Perhaps the Committee deleted the ban on paper money because it thought that "coining" had a purely metallic meaning, such that the Coinage Clause would not have given power to issue paper currency anyway. Perhaps the Committee's addition of a separate power to issue bills of credit was the reason the ban was omitted; if so, the Convention's deletion of that power may have implied the reinstatement of the ban.

Another excerpt from the Convention records—overlooked by previous commentators—can be read to support the view that the Framers were using "bill of credit" as a synonym for all paper money.<sup>251</sup> As we shall see, however, this excerpt is also ambiguous. The Committee of Detail's final draft provided that "No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make any thing but specie a tender in payment of debts."<sup>252</sup> Wilson and Roger Sherman proposed moving state bill of credit emissions and tender laws from the list of powers that states could exercise conditionally on consent of Congress to the list of powers that states could not exercise at all. According to Madison's August 28th report:

Mr. Wilson & Mr. Sherman moved to insert after the words "coin money" the words "nor emit bills of credit, nor make any thing but gold & silver coin a tender in payment of debts" making these prohibitions absolute, instead of ~~making the measures allowable~~—(as in the XIII art:) *with the consent of the Legislature of the U. S.*

Mr. Ghorum thought the purpose would be as well secured by the provision of art: XIII which makes the consent of the Genl. Legislature necessary, and that in that mode, no opposition would be excited; whereas an absolute prohibition of *paper money* would rouse the most desperate opposition from its partizans—

Mr. Sherman thought this a favorable crisis for crushing *paper money*. If the consent of the Legislature could authorize emissions of it, the friends of paper money would make every exertion to get into the Legislature in order to license it.

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251. *See id.* at 439.

252. *See id.* at 187.

The question being divided: on the 1st. part—“nor emit bills of credit”

N. H. ay. Mas. ay. Ct. ay. Pa. ay— Del. ay. Md divid. Va. no. N— C— ay— S— C. ay. Geo. ay. [Ayes—8; noes—1; divided—1.]

The remaining part of Mr. Wilson’s & Sherman’s motion, was agreed to nem: con.<sup>253</sup>

The suggestion that prohibiting state bills of credit would constitute an “absolute prohibition of paper money” implies that the speakers were imprecisely using the terms “bills of credit” and “paper money” interchangeably. Yet the resolution also included a rule against making “any thing but gold & silver coin a tender in payment of debts.” So, some delegates might have thought that to completely “crush[] paper money,” it was necessary to include *both* a prohibition of bills of credit and the tender provision, the latter to proscribe legal tender paper money other than bills of credit.

In sum, the proceedings at the federal Convention leave us doubtful that the drafters had any prevailing intent to grant or deny the central government a paper-money power. Even if the proceedings had been clearer, this would not have helped the ratifying public understand the Convention’s intent, because the proceedings were closed from public view. The resulting Constitution that the public *did* see failed to communicate fully whatever intent the Framers had formed on monetary matters. It banned state “bills of credit,” but it was unclear about whether the phrase meant “a government debt instrument that serves as a circulating medium” or “all paper money.” The Constitution was also silent on whether the federal government could issue “bills of credit” (however defined) or paper money in general. Finally, as explained below, the Constitution’s use of the words “coin” and “to coin” were subject to two plausible, but very different, interpretations.<sup>254</sup>

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253. 2 FARRAND, *infra* note 344, at 439 (second and third emphases added).

254. *See* discussion *infra* Part III.C.

### III. THE ORIGINAL PUBLIC MEANING OF THE COINAGE CLAUSE

#### A. *Initial Considerations*

Those who have tried to wring an interpretation of the Coinage Clause from the records of the federal Convention may have been squeezing the wrong fruit. Founding generation lawyers, like most originalists today, understood that in seeking a document's meaning, the relevant inquiry is into "the intent of the makers," and that the ratifiers, not the drafters, were the Constitution's makers. It was the ratifiers who converted a mere proposal into a legal reality.<sup>255</sup> Therefore, the real value of the debates at the federal Convention lies in the light they cast on the meaning to the ratifiers.<sup>256</sup> This Part examines the prevailing meaning of the expressions "to regulate the Value" and "to coin Money" at the time those phrases would have been presented to the ratifying public.

#### B. *The Clear Original Meaning and Understanding of "Regulate the Value"*

The historical record leaves little doubt about the public meaning of the phrase "regulate the Value." That phrase was coupled with the words "to coin Money" in accordance with the common law rule that one who strikes money also has the power to set its value.<sup>257</sup> As discussed above,<sup>258</sup> setting the value of money encompassed determinations of which domestic and foreign currency would be legal tender and to what extent it would be legal tender; the government was entitled to any seigniorage. Pelatiah Webster of Philadelphia reflected common understanding when, in 1780, he wrote:

The nature of a Tender-Act is no more or less than establishing by law the standard value of money, and has the same use with respect to the currency, that the legal standard pound, bushel, yard, or gallon has to these goods, the quan-

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255. See discussion *supra* Part I.

256. See generally Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1148-64 (2003).

257. See *supra* note 76 and accompanying text.

258. See *supra* text accompanying notes 71-90.

titles of which are usually ascertained by those weights and measures . . . .<sup>259</sup>

Not only is this understanding clear, but it makes sense as a textual matter, for only by deciding issues of legal tender could Congress fully “regulate the Value” of money. If Congress were denied the power to determine questions of legal tender, then it would be missing an important tool that governments traditionally employed for monetary regulation.<sup>260</sup>

The historical record does not seem to contain anything that suggests the ratifiers’ understanding of the phrase “regulate the Value [of Money]” differed from the public meaning at the time. Therefore, a determination of the original intent of the Coinage Clause may proceed to more difficult matters.<sup>261</sup>

### C. *The Ambiguous Original Public Meaning of “Coin”*

The more common meaning of “coin” in the eighteenth century, as now, referred to metallic tokens.<sup>262</sup> Madison used the word this way in *The Federalist*, when he wrote that “the same reasons which shew the necessity of denying to the states the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin.”<sup>263</sup> Nonetheless, other possible definitions of “coin”—recognized even in monetarist Britain—were “Payment of any kind”<sup>264</sup> and “all Manner of the several Stamps and Species in any Nation.”<sup>265</sup> The verb “to coin” could mean “to make or forge any thing”<sup>266</sup> (represented today by the common

259. Pelatiah Webster, *Strictures on Tender-Acts* (1780), in *BANKING AND CURRENCY*, *infra* note 344, at 125–26.

260. Some have argued that the power to declare money legal tender is merely implied, but this conclusion is based on little or no historical evidence. *See, e.g.*, Thayer, *infra* note 344, at 84; *see also* HURST, *infra* note 344, at 13 (“[T]here is no evidence that the framers thought of legal tender as a dimension of *value* . . .”). Professor Hurst seems to have overlooked contemporary British and American regulatory practices.

261. *See supra* notes 16–17 and accompanying text (explaining the methodology for determining original understanding).

262. JOHNSON, *DICTIONARY*, *infra* note 344 (giving as the first definition of “to coin,” “To mint or stamp metals for money”).

263. *THE FEDERALIST* NO. 44, *infra* note 344, at 244 (James Madison).

264. JOHNSON, *DICTIONARY*, *infra* note 344 (giving second definition of “coin”).

265. *STUDENT’S LAW-DICTIONARY*, *infra* note 344 (defining “coin”).

266. FRANCIS ALLEN, *A COMPLETE ENGLISH DICTIONARY* (1765) (defining “to coin”).

expression, "to coin a phrase"); so, pursuant to this usage, paper money could be "coined."

To the modern speaker of English, the metallic meaning seems the more natural one,<sup>267</sup> but this was less so in the eighteenth century. When speaking of matters other than the financial practices of the British government, eighteenth-century English speakers, like Shakespeare's Falstaff before them,<sup>268</sup> often used both the noun and verb form of "coin" in broader ways. This was true not only of rogues like Falstaff, but of quite respectable people. For example, in his celebrated *Cyclopaedia*, Ephraim Chambers wrote, "The Hollanders, we know, *coined* great quantities of pasteboard in the year 1574."<sup>269</sup> This formulation was later adopted almost word-for-word by the *Encyclopaedia Britannica*.<sup>270</sup>

What could be said of pasteboard and the Dutch could also be said of paper. In 1700, the anonymous author of a pamphlet on trade reflected on how other nations might compete with the English woolen trade by "Coining Paper Money."<sup>271</sup> In 1720, economist John Law proposed "Coining Notes of one Pound"<sup>272</sup> and otherwise "coining" paper money.<sup>273</sup> A few

267. This may explain why even the most eminent authority has adopted this meaning without further investigation. See, e.g., HURST, *infra* note 344, at 16 ("[T]he only explicit authorization on making money was 'to coin' it; in the contemporary setting coinage meant mainly gold or silver . . ."). Professor Hurst followed this statement with a footnote, but that footnote offered no substantiation for his textual assertion. *Id.* See also Pai, *infra* note 344, at 555 ("But the Framers' use of 'coin' counsels against this expansive reading. 'Coin,' as opposed to 'raise' or 'produce,' has a narrow, literal meaning. Its use suggests metal, and for a reason: metal's inherent worth gives it stability. As such, the Coinage Clause provides tenuous support for Congress's power to create legal tender.").

268. See *supra* note 2 and accompanying text. Shakespeare used "coin" in the broader sense quite frequently. See, e.g., WILLIAM SHAKESPEARE, CORIOLANUS act 3, sc. 1, in THE COMPLETE WORKS (Stanley Wells & Gary Taylor, eds. 2d ed. 2005) ("[S]o shall my lungs Coin words"); WILLIAM SHAKESPEARE, CYMBELINE act 2, sc. 1, in THE COMPLETE WORKS, *supra* ("A mother hourly coining plots"); *id.* at act 5, sc. 5 ("'Tis not so dear, yet 'tis a life; you coined it."); WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4, in THE COMPLETE WORKS, *supra* ("This is the very coinage of your brain.").

269. CHAMBERS, CYCLOPEDIA, *infra* note 344 (discussing "money") (emphasis added).

270. 7 ENCYCLOPEDIA BRITANNICA 5159 (2d ed. 1781) ("[T]he Hollanders, we know, coined great quantities of pasteboard in the year 1574.").

271. SOME OBSERVATION'S ON OUR TRADE, AND THE USE OF A STANDARD 101 (n.d.) ("[I]f they find that our advantage arises by the use of Notes, they may easily counterplot us by Coining Paper Money also . . .").

272. JOHN LAW, MONEY AND TRADE CONSIDER'D 32 (2d ed., London 1720).

273. See *id.* at 71 ("[n]otes be coin'd"); *id.* at 80 ("[t]he Proprietor to coin pieces of Paper"); *id.* 95 ("[i]f [paper money] is coin'd for 15 Years Purchase").

years later, Daniel Defoe related how tradesmen “coined bills payable from one to another.”<sup>274</sup> When the American colonies declared their independence, John Shebbeare attacked them for “coining paper money.”<sup>275</sup> The debates in the Irish Parliament of 1784 include a reference to “coining paper into money.”<sup>276</sup> Thomas Paine argued that “[o]f all the various sorts of base coin, paper-money is the basest.”<sup>277</sup> When Benjamin Franklin urged issuance of Pennsylvania paper money secured by land, he characterized it as “Coined Land.”<sup>278</sup> In the 1742 case of *Charitable Corporation v. Sutton*,<sup>279</sup> Chancellor Hardwicke referred to “notes coined”<sup>280</sup> by private parties, and to “coining notes.”<sup>281</sup> These are not isolated examples.<sup>282</sup> And although not everyone

274. 2 DANIEL DEFOE, *THE COMPLETE ENGLISH TRADESMAN* 19 (5th ed., London 1745); see also *id.* at 20 (“As those bills were coined . . . they coined.”).

275. JOHN SHEBBEARE, *AN ESSAY ON THE ORIGIN, PROGRESS AND ESTABLISHMENT OF NATIONAL SOCIETY* 141 (London 1776).

276. 1 *THE PARLIAMENTARY REGISTER* 302 (2d ed., Dublin 1784) (quoting Member Flood as saying: “It is proposed that we should give a certain number of men a power of coining paper into money.”).

277. THOMAS PAINE, *DISSERTATIONS ON GOVERNMENT, THE AFFAIRS OF THE BANK, AND PAPER-MONEY* 46 (Philadelphia 1786).

278. FRANKLIN, *supra* note 146, at 349 (Philadelphia 1729).

279. (1742) 9 Mod. 349, 88 Eng. Rep. 500 (Ch.).

280. *Id.* at 352, 88 Eng. Rep. at 501.

281. *Id.* at 353, 354, 88 Eng. Rep. at 502. For other examples of the broader meaning of the verb “coin” in eighteenth-century cases, see *Anonymus* (1727) Fitzg. 2, 3, 94 Eng. Rep. 627, 627 (K.B.) (Raymond, C.J.) (“[W]here no proper [Latin] word is to be found [for a pleading], he is allow’d to coin and explain his word by an Anglice . . .” [an English translation]); *Dorvill v. Aynesworth* (1727) 1 Barn. K.B. 28, 29, 94 Eng. Rep. 19, 20 (K.B.) (“But Judge Reynolds said, that the utensils among the Romans were not the same as amongst us, and therefore the Court would allow greater latitude, and let you coin words in such cases.”).

282. Seventeen additional references follow in chronological order (and more could have been provided): JAMES MILNER, *THREE LETTERS RELATING TO THE SOUTH-SEA COMPANY AND THE BANK* 22 (London 1720) (repeating the argument that a country can “coin Paper”); *Letter from Humphrey Morice to Bishop Atterbury* (May 8, 1728), in 5 *THE MISCELLANEOUS WORKS OF BISHOP ATTERBURY* 105, 106 (John Nichols ed., London 1796) (“paying off several public debts, by coining paper instead of money”); DR. MOWBRAY, *THE REPORT OF THE GENTLEMEN APPOINTED BY THE GENERAL COURT OF THE CHARITABLE CORPORATION* 4 (London 1732) (referring to the issuance of notes as “to coin Notes”); *A Modest Apology for Paper Money*, WKLY. REHEARSAL, Mar. 18, 1734, at 92 (referring to paper money secured by land as “coined Land”); *A Letter Relating to a Medium of Trade, In the Province of the Massachusetts-Bay*, in 4 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 3, 5 (Boston 1740) (complaining of “the Clippers of our Coin (i.e., our Bills of Credit)”; WILLIAM ALLEN, *THE LANDLORD’S COMPANION* 5 (London 1742) (referring to the possibility of bringing certain countries “to a Paper-Coin only”); ERASMUS PHILIPS, *MISCELLANEOUS [sic] WORKS CONSISTING OF ESSAYS POLITICAL AND MORAL* 67 (London 1751) (“this large and regular Interest has made a Paper-

approved of applying the word “coin” to non-metallic media, the existence of a recorded protest testifies that the usage was common enough.<sup>283</sup>

A potential ratifier examining the proposed Constitution would have been encouraged by the context to read the document’s use of “coin” in this broader manner. In perusing the Coinage Clause, the reader would have seen the words, “To coin Money, regulate the Value thereof, and of foreign Coin.”<sup>284</sup> Applying the metallic definition to “coin” would result in Congress having power to issue metal tokens but no other kind of money, and to regulate the value of foreign metal tokens but not any other foreign currency. It seems unlikely, however, that the Founding generation would have wished to deny Congress

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coin current among us”); AN ESSAY ON PAPER CIRCULATION, AND A SCHEME PROPOSED FOR SUPPLYING THE GOVERNMENT WITH TWENTY MILLIONS, WITHOUT ANY LOAN OR NEW TAX 36 (London 1764) (calling paper money a kind of “coin”); MICHAEL COMBRUNE, AN ENQUIRY INTO THE PRICES OF WHEAT, MALT, AND OCCASIONALLY OF OTHER PROVISIONS 11 (T. Longman, London 1768) (stating that at a given point of history, “paper coin was then unknown”); 1 THE ORIGINAL WORKS OF WILLIAM KING, LL.D. 199 (London 1776) (stating that the King of France “had established a paper credit (or, if you please to call it, coin) of bills issued out of the Exchequer”); *Remarks on the Circulation of Commodities, Goods, Money, &c. and their Uncertainty*, FARM’S MAG., Jan. 1779, at 13, 13 (contemplating “if the Bank of England itself should coin paper”); NATHANIEL SMITH, ON THE DEBT OF THE NATION COMPARED WITH ITS REVENUE 131 (London 1781) (“for it would be only coining more paper”); MINUTES OF SEVERAL CONVERSATIONS BETWEEN THE REV. MR. JOHN AND CHARLES WESLEY, AND OTHERS 15 (J. Paramore, London n.d.) (“that base practice, of raising Money by *coining Notes*, (commonly called the *Bill-trade*)”); STEPHEN WESTON, LETTERS FROM PARIS, DURING THE SUMMER OF 1792 WITH REFLECTIONS 51 (London 1793) (“You see the government, notwithstanding its facility in coining paper-money, is under the necessity of buying gold and silver . . .”); A COLLECTION OF FACTS, RELATIVE TO THE COURSE OF EXCHANGE, BETWEEN ENGLAND AND HOLLAND 11 (Thomas Pearson, Birmingham 1793) (referring to bills of exchange as “nominal coin”); GEORGE CHALMERS, STRICTURES ON A PAMPHLET WRITTEN BY THOMAS PAINE, ON THE ENGLISH SYSTEM OF FINANCE 19 (2d ed., London 1796) (“they are always paid in Bank notes coined for the purpose”); JOHN SINCLAIR, LETTERS WRITTEN TO THE GOVERNOR AND DIRECTORS OF THE BANK OF ENGLAND, IN SEPTEMBER, 1796, at 26, 33 (W. Bulmer & Co., London 1797) (referring to “the coining of paper money” and “coining paper”); THOMAS FRY, A NEW SYSTEM OF FINANCE 94, 119 (London 1797) (referring several times to “coining paper” and to “paper coinage”). These examples were culled from the Thomson Gale database, *Eighteenth Century Collections Online*.

283. See *A Letter from a Gentleman in Boston, to his Friend in Connecticut* (Boston 1743), in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 217, 229 (1743) (“But I apprehend the Gentlemen are much mistaken, and that Coinage and Currencies are non synonymous [sic] and convertable [sic] Terms; Coinage being only applicable to Metals: Hence Coin differs from Money.”).

284. U.S. CONST. art. I, § 8, cl. 5.

the power to regulate foreign paper.<sup>285</sup> Buttrressing this inference is analogous language in the Articles of Confederation, granting Congress “the sole and exclusive right and power of regulating the alloy and value of coin struck by [authority] . . . of the respective States.”<sup>286</sup> Because, at the time the Articles were adopted, the states had issued primarily paper money rather than metallic tokens, such language would not have been of much consequence unless the term “coin” was read to include paper money.<sup>287</sup>

The word “Coin” also appears in another clause of Article I, Section 8, giving Congress authority “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”<sup>288</sup> The provision does not seem to suggest a particular meaning of “Coin,” because whether or not paper money is included in the meaning, the United States was certainly likely to issue “Securities,” such as bonds, distinct from money. Therefore, there are no relevant inferences to be drawn from the presence of “Coin” in this provision.

There is, however, yet another use of “coin” in the Constitution’s text. Article I, Section 10 provides: “No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts.”<sup>289</sup> One could argue that the separate listing of “coin Money” and “emit Bills of Credit” suggests that “coin Money” refers to metal while “Bills of Credit” refers to paper. But bills of credit were only one kind of paper money,<sup>290</sup> and in any event, the items on this list of prohibitions overlap each other significantly. The printing of legal tender bills of credit, for example, would have violated at least three, and perhaps four, separate proscriptions in the list.<sup>291</sup>

285. Of course, one could argue that if the narrower definition were applied, Congress still could regulate foreign non-metallic money under its power to “regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3, but this would render the entire Foreign Coinage Clause superfluous.

286. ARTS. CONFED. art. IX.

287. I am indebted for this insight to Kathleen Pirozzolo, Class of 2007, Georgetown University Law Center.

288. U.S. CONST. art. I, § 8, cl. 6.

289. U.S. CONST. art. I, § 10, cl. 1.

290. See *supra* notes 178–80 and accompanying text.

291. They are (1) emitting bills of credit, (2) making them a tender, (3) impairing the obligation of contracts, and perhaps (4) passing an ex post facto law. See *gener-*

A Ratification-era reader might well have noted that this use of “coin” was modified by the adjectives “gold and silver,” while the word was used without modification in the Coinage Clause. As Chief Justice Marshall pointed out in an analogous situation, the absence of modifiers suggests a wider meaning.<sup>292</sup> “[C]oin” in the Coinage Clause should, therefore, include coins made of substances other than gold and silver. It is unreasonable to contend that coins could be made only of base metals but not of other kinds of material (such as paper), because determined politicians can debase money by using cheap metal almost as well as by using anything else. Consider the possibility of one-thousand-dollar tin coins.<sup>293</sup>

The word “coin” does not appear further in the Constitution, but the word “Money” does. A purely metallist reading of “Money” has implications for federal financial operations that the Founders certainly could not have intended. As Attorney General Akerman argued in the *Legal Tender Cases*:<sup>294</sup>

“No appropriation of money” [to the use of raising and supporting armies] “shall be for a longer term than two years.” This provision would certainly be violated by an appropriation of treasury notes to the support of the army for three years. “No money shall be drawn from the treasury but in consequence of appropriations made by law.” Treasury notes could not be drawn from the treasury without such

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ally Natelson, *Retroactivity*, *infra* note 344 (discussing the interrelationship between these provisions and the contemporaneous belief that ex post facto laws could be civil as well as criminal statutes).

292. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387–88 (1819) (Marshall, C.J.) (drawing implications about the meaning of the unqualified adjective “necessary” from that adjective’s qualified usage elsewhere in the Constitution).

293. The United States Attorney General Amos Akerman made this point in a particularly colorful way in the *Legal Tender Cases*:

Some men appear to consider that there is a peculiar constitutional virtue in metal, whether gold, silver, nickel, or copper. According to them, what is a crime against the Constitution, if done in paper, may be innocently done in metal. The obligation of contracts may be impaired, in metal. The dictates of justice may be disobeyed, in metal. A man may be lawfully compelled to take, in metal, a fraction in value of what he contracted for. The scope for the discretion of Congress is unlimited within the metallic field. That sensitive being, always invoked in such discussions, whom they denominate “the spirit of the Constitution,” though enraged by the rustle of paper, is lulled to repose by the clink of metal, however base.

*Legal Tender Cases*, 79 U.S. 457, 520 (1870). See also Akhil Reed Amar, 1999 *Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 73 n.156 (2000) (making a similar argument).

294. 79 U.S. 457 (1870).

appropriation. [Yet] [t]he regular statement “of the receipts and expenditures of all public money,” which the same section requires to be published from time to time, would be incomplete if treasury notes were left out.<sup>295</sup>

Akerman might have added that, in such a world, when the federal government exercised its power to “borrow Money,”<sup>296</sup> it could receive from lenders only metal.

As previously shown, one cannot prove that the drafters of the Constitution specifically intended “coin” to have a broader meaning, because their intents appear to have varied, and not all of their views are recoverable.<sup>297</sup> Yet the *ratifiers* could easily have understood the word in a broad way. The ratification records should now be evaluated to determine the direct evidence of their understanding.

#### IV. THE RATIFIERS CHOOSE A MEANING FOR “COIN”

The ratification records contain substantial discussion of the question whether the Constitution would permit the federal government to emit paper currency. Just as the ratifiers had to select a meaning for the uncertain constitutional phrase “ex post facto Law,”<sup>298</sup> so too did they have to determine a meaning for “coin.” The evidence suggests that the meaning the ratifiers chose was broad enough to include the power to “coin paper.”

The ratification record includes many general comments that the Constitution would put an end to paper money.<sup>299</sup> These

295. *Id.* at 521.

296. U.S. CONST. art. I, § 8, cl. 2.

297. *See supra* Part II.E.2.

298. U.S. CONST. art. I, § 9, cl. 3; *see generally* Natelson, *Retroactivity*, *infra* note 344, at 517–22 (discussing the debate over the meaning of the disputed term, and finding that the ratifiers limited it to criminal statutes).

299. *See, e.g.*, 3 ELLIOT’S DEBATES, *infra* note 344, at 566 (reporting Antifederalist William Grayson as stating at the Virginia ratification convention, “There is one clause in the Constitution which prevents the issuing of paper money. If this clause should pass, (and it is unanimously wished by every one that it should not be objected to,) I apprehend an execution in Rhode Island would be as good and effective as in any state in the Union.”); 2 DOCUMENTARY HISTORY, *infra* note 344, at 78 (reporting Daniel Clymer as stating at the Pennsylvania ratifying convention that when the Constitution is adopted, America will “no longer [be] subject to the fluctuation of faithless paper money and party laws”); Commentary, *A Freeholder*, VA. INDEP. CHRON. (Richmond), April 23, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *infra* note 344, at 753, 754 (stating that under the Constitution, debtors “can no longer hope for paper money”); Commentary, *The Protest of the Minority, Who Objected to Calling a Convention, for the Purpose of Adopting the Foederal Constitution*, PA. GAZETTE

comments should be taken, however, as reflecting the Constitution's ban on state emissions only, not any putative federal ban. One general reason for this is that the prior history of paper money had been almost exclusively a history of emissions by *colonies and states*. Colonies and states had been emitting paper currency almost continuously for nearly a century, and during the ratification debates most of the states had returned to their traditional practices.<sup>300</sup> Congressional emissions from 1775 to 1780 represented the only exception, and by the time of the ratification debates, Congress had terminated all of its issues and had no plans to resume them. Thus, from the standpoint of the participants in the ratification debates, a Constitution that banned state emissions would likely stop all emissions for the foreseeable future.

When debate participants spoke less generally and focused specifically on the Constitution's provisions pertaining to paper money, almost everyone emphasized that the prohibition on bills of credit applied to the *states*.<sup>301</sup> Federalists cited prior

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(Philadelphia), Oct. 3, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 155, 156 (claiming (satirically) that Antifederalist objections to the Constitution arose because it "puts an end to all future emissions of paper money"); PA. PACKET (Philadelphia), Dec. 3, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 457, 457 (reporting a statement by Dr. Benjamin Rush at the Pennsylvania ratifying convention that through the Constitution, "an eternal veto will be stamped on paper emissions"); PA. HERALD (Philadelphia), Dec. 26, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 415, 418 (quoting Thomas McKean as stating at the Pennsylvania ratifying convention that by adoption of the Constitution, "some security will be offered for the discharge of honest contracts and an end put to the pernicious speculation upon paper emissions."). The *Pennsylvania Herald's* accounts of the debates were written by its editor, Alexander J. Dallas, who was eventually fired over allegations of bias and inaccuracies in his accounts. 2 DOCUMENTARY HISTORY, *infra* note 344, at 40; *see also* *Legal Tender Cases*, 79 U.S. at 497 (reporting the argument of counsel that "[i]t was declared in every State whose debates on adopting the Constitution are reported, that paper money was to be put an end to").

300. Schweitzer, *infra* note 344, at 315 ("The movement to print more money was not a continuation of the wartime issues, but rather the return to prewar practices regarding paper money.").

301. The number of recorded statements is copious. *See, e.g.*, Chief Justice Henry Osborne, Charge to the Chatham County [Georgia] Grand Jury (Mar. 4, 1789) ("The Federal Constitution has wisely taken away from each of the states the power of emitting a paper money; therefore no further emission (happily for us) can ever be made by the state."); A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (1788), *reprinted in* 9 DOCUMENTARY HISTORY, *infra* note 344, at 655, 676-77 (referring to ban on paper money as a prohibition on the states); AN ORATION (David Ramsay), PREPARED FOR DELIVERY BEFORE THE INHABITANTS OF CHARLESTON, ASSEMBLED ON THE 27TH MAY, 1788, TO CELEBRATE THE ADOPTION OF THE NEW CONSTITUTION BY SOUTH CAROLINA (1788), *reprinted in* 18 DOCUMENTARY HISTORY, *infra* note 344, at 158, 162 (referring

*state actions* that justified the ban.<sup>302</sup> When they mentioned con-

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to the ban on bills of credit as operating at the state level); THE FEDERALIST NO. 80, *infra* note 344, at 508 (Alexander Hamilton) (“The States, by the plan of the convention, are prohibited from doing a variety of things . . . The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind.”); Commentary, *A Friend to Honesty*, INDEP. CHRON. (Boston), Jan. 10, 1788, *reprinted* in 5 DOCUMENTARY HISTORY, *infra* note 344, at 687, 689 (“Does it then offend you, to find that this new constitution will deprive State assemblies of the power of relieving fraudulent debtors, with that precious facility called *paper-money*?”); Brutus, Commentary, *To the Citizens of the State of New-York*, N.Y. J., Oct. 18, 1787, *reprinted* in 13 DOCUMENTARY HISTORY, *infra* note 344, at 411, 415 (“No state can emit paper money . . .”); Cassius, Commentary, *To the Inhabitants of this State* (pt. 2), MASS. GAZETTE (Boston), Dec. 18, 1787, *reprinted* in 5 DOCUMENTARY HISTORY, *infra* note 344, at 479, 482 (“The last section of this article provides, that no state shall enter into any treaty, alliance, &c. coin money, emit bills of credit . . . The absolute necessity of power of this nature being vested in a federal head is indisputable.”); Commentary, *To the Good People of Virginia, on the New Federal Constitution, by an Old State Soldier, in Answer to the Objections*, VA. INDEP. CHRON. (Richmond), April 2, 1788, *reprinted* in 9 DOCUMENTARY HISTORY, *infra* note 344, at 647, 652 (referring to the ban on paper money as a prohibition on the states); PA. HERALD (Philadelphia), Jan. 5, 1787, *reprinted* in 2 DOCUMENTARY HISTORY, *infra* note 344, at 436, 438 (reporting Jaspar Yeates as referring to the ban on paper money as one of “the restrictions on the several states”); Jaspar Yeates, *Notes of Speech Delivered in Convention Novr. 30, 1787* (Nov. 30, 1787), in 2 DOCUMENTARY HISTORY, *infra* note 344, at 434, 436 (reporting himself as saying at the Pennsylvania ratifying convention, “It is confessed the 10th section . . . abridges some of the powers of the state legislature, as in preventing them from coining money, [and] emitting bills of credit . . . If state governments are prevented from exercising these powers, it will produce respectability, and credit will immediately take place. . . . Congress alone with the powers given them by this system, or similar powers, can effect these purposes.”).

See also 4 ELLIOT’S DEBATES, *infra* note 344, at 156, which reports William David as having said at the North Carolina ratifying convention:

There are certain prohibitory provisions in this Constitution, the wisdom and propriety of which must strike every reflecting mind, and certainly meet with the warmest approbation of every citizen of this state. It provides, “that no state . . . shall emit bills of credit, [or] make any thing but gold and silver coin a tender in payment of debts.” These restrictions ought to supersede the laws of particular states.

302. Again, the record is copious. See, e.g., 2 ELLIOT’S DEBATES, *infra* note 344, at 144 (quoting Reverend Thatcher as contending at the Massachusetts ratifying convention: “In South Carolina, creditors, by law, were obliged to receive barren and useless land for contracts made in silver and gold. I pass over the instance of Rhode Island: their conduct was notorious.”); 3 ELLIOT’S DEBATES, *infra* note 344, at 207 (quoting Edmund Randolph as asserting at the Virginia ratifying convention: “Does not the prohibition of paper money merit our approbation? I approve of it because it prohibits tender-laws, secures the widows and orphans, and *prevents the states* from impairing contracts. I admire that part which forces Virginia to pay her debts.” (emphasis added)); 3 ELLIOT’S DEBATES, *infra* note 344, at 549 (quoting Edmund Pendleton as arguing at the same convention that a federal judiciary will be necessary to strike down “[p]aper money and tender laws . . . passed in other states, in opposition to the federal principle, and restriction of this Constitution”); 4 ELLIOT’S DEBATES, *infra* note 344, at 159 (reporting William Davie as saying at the North Carolina ratifying convention, “It is essential

tinental money at all, they tended to be much more tolerant, ascribing congressional difficulties to the exigencies of the Revolution<sup>303</sup> or otherwise justifying congressional conduct.<sup>304</sup> State issues of legal tender paper, on the other hand, were attacked both as immoral efforts to redistribute wealth from some constituencies to others<sup>305</sup> and as a source of bad interna-

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to the interest of agriculture and commerce that *the hands of the states* should be bound from making paper money, instalment [sic] laws, or *pine-barren acts*. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims." (first emphasis added)); THE FEDERALIST NO. 44, *infra* note 344, at 285 (James Madison) (complaining of "[t]he loss which America has sustained since the peace, from the pestilent effects of [state] paper money" (emphasis added)).

303. See, e.g., 3 ELLIOT'S DEBATES, *infra* note 344, at 290 (quoting William Grayson at the Virginia ratifying convention as stating, "Paper money has been introduced. What did [Congress] do a few years ago? Struck off many millions . . . . However unjust or unreasonable this might be, I suppose it was warranted by the inevitable laws of necessity."); see also 4 ELLIOT'S DEBATES, *infra* note 344, at 169 (reporting Matthew Locke, a defender of paper money, as stating at the North Carolina ratifying convention: "Necessity compelled them to pass the law, in order to save vast numbers of people from ruin. I hope to be excused in observing that it would have been hard for our late Continental army to lay down their arms, with which they had valiantly and successfully fought for their country, without receiving or being promised and assured of some compensation for their past services."); 4 ELLIOT'S DEBATES, *infra* note 344, at 294 (reporting Robert Barnwell as saying at the South Carolina legislative session that called the state's ratifying convention that "it was not the state, but the Continental money, that brought about the favorable termination of the war").

304. See, e.g., 3 ELLIOT'S DEBATES, *infra* note 344, at 258, which reports James Madison as saying at the Virginia ratifying convention:

At one period of the congressional history, they had the power to trample on the states. When they had that fund of paper money in their hands, and could carry on all their measures without any dependence on the states, was there any disposition to debase the state governments? All that municipal authority which was necessary to carry on the administration of the government, they still retained unimpaired. There was no attempt to diminish it.

305. See, e.g., A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (referring to the ban on paper money as a prohibition on the states, and giving as a reason that an issue of paper money by one state "might defraud not only its own citizens, but the citizens of other States"); *To the Freemen of Pennsylvania*, PA. GAZETTE (Philadelphia), Oct. 10, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *infra* note 344, at 362, 365 ("See, in Rhode-Island, the bonds of society and the obligations of morality dissolved by paper money and tender laws.").

The colonists had long recognized that depreciating currency enriched some social groups at the expense of others. See, e.g., WILLIAM DOUGLASS, A DISCOURSE CONCERNING THE CURRENCIES OF THE BRITISH PLANTATIONS IN AMERICA (1740), *reprinted in* 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 307, 328-31 (listing various classes as disadvantaged by paper money); HUTCHINSON, *infra* note 344, at 435 (noting the poor moral effects of depreciating paper money); THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES, ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), *reprinted in* 3 COLO-

tional and interstate relationships.<sup>306</sup> Participants took particular offense to the actions of Rhode Island, which, among other measures, had structured the tender provisions of its paper money act to benefit in-state debtors at the expense of out-of-state creditors.<sup>307</sup>

Antifederalist objections to the Constitution's provisions on paper money focused almost entirely on the effect of those provisions *on the states*. At the North Carolina ratifying convention, Antifederalists argued that the ban could cause hardship because it might be construed to invalidate North Carolina bills of credit that were already in circulation.<sup>308</sup> In Virginia, Antifederalists argued that, in conjunction with the prohibition on state *ex post facto* laws,<sup>309</sup> the proscription of state bills of credit might require Virginia taxpayers to repay the Old Dominion's Revolutionary War debt "shilling for shilling,"<sup>310</sup> instead of allowing the state government to issue paper to "scale" (discount) it.<sup>311</sup>

Much of the ratification debate was devoted to arguments over what particular constitutional clauses would mean in practice. Only one significant figure argued specifically that the

NIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152–53 (listing widows, orphans, clergy, and "[s]alary [m]en" among the losers); Samuel Mather, Letter to the Editor, *NEW-ENG. WKLY. J.*, Feb. 4, 1734, *reprinted in* 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 21 (arguing that winners from paper money included tenants and debtors, while losers included widows, orphans, day laborers, public officials, and country ministers on fixed incomes).

306. See Schweitzer, *infra* note 344, at 322 ("It was the damage of legal tender laws to interstate relations . . . that resulted in the Constitutional prohibition of state paper money."). Paper money damaged interjurisdictional relationships even during the colonial era. See HUTCHINSON, *infra* note 344, at 380–81 (discussing such an aggravation of relations between the New England colonies in 1733).

307. See *supra* notes 220–22 and accompanying text.

308. See generally 4 ELLIOT'S DEBATES, *infra* note 344, at 173–86. The convention issued the following resolution:

*Resolved, unanimously*, That it be recommended to the General Assembly to take effectual measures for the redemption of the paper currency, as speedily as may be, consistent with the situation and circumstances of the people of this state.

*Id.* at 252.

309. See U.S. CONST. art. I, § 10.

310. 3 ELLIOT'S DEBATES, *infra* note 344, at 319 (quoting Patrick Henry, an Antifederalist, as saying: "Pass this government, and you will be carried to the federal court, . . . and you will be compelled to pay shilling for shilling.>").

311. This argument was made repeatedly at the Virginia ratifying convention by the leaders of the Antifederalists, Patrick Henry, see *id.* at 318–19, 322, and George Mason, see *id.* at 472–73. But see *id.* at 473 (Madison's response).

Constitution's monetary provisions would prohibit the federal government from emitting paper money.<sup>312</sup> That person was Luther Martin, the Maryland Attorney General and Antifederalist, who at the Philadelphia Convention had been on the losing side of the vote to remove the express reference to federal bills of credit.<sup>313</sup> Martin had been, in other words, one of the minority at the Convention who believed both that the federal government should have the power to issue bills of credit and that deleting the language would delete the power.<sup>314</sup>

Few seem to have accepted his argument. Even a satirist pretending to be Martin could not bring himself to repeat Martin's assertion that the federal government was barred from issuing bills of credit. Instead, the satirist recharacterized Martin's argument as stating that, "The framers of [the Constitution] have inserted a clause prohibiting paper-money emissions, and legal tenders, *in any of the states.*"<sup>315</sup>

All of Martin's Antifederalist allies who addressed the issue interpreted the Constitution as permitting the central government to issue paper money. At the Pennsylvania ratifying convention, William Finley, responding to Federalist attacks on bills of credit, pointed out that the Constitution contained "no guard against Congress making paper money."<sup>316</sup> Other Anti-

312. See Luther Martin, *Information to the House of Assembly* (pts. 6 & 8), BALTIMORE MD. GAZETTE, Jan. 15, 1788, reprinted in 15 DOCUMENTARY HISTORY, *infra* note 344, at 374, 378–79; BALTIMORE MD. GAZETTE, Jan. 22, 1788, reprinted in 15 DOCUMENTARY HISTORY, *infra* note 344, at 433 (asserting that the federal government would have no power to issue paper money or pass installment laws).

In addition to the one "significant figure," there was one *insignificant* figure as well. A local (Queens County, New York) writer misread Article I, Section 10 as applying to the federal government, quoting the language "nothing but gold and silver Coin shall be a Tender in Payment of Debts" as applying to Congress. Even that writer, though, did not deny that the federal government might issue paper money, but claimed only that it could not be legal tender. This contention appeared in a broadside, not in a published article, and apparently had only local impact. Broadside, Flat-Bush, *To the Inhabitants of King's County* (April 21, 1788), in 21 DOCUMENTARY HISTORY, *infra* note 344, at 1472; see also 21 DOCUMENTARY HISTORY, *infra* note 344, at 1475 nn.1–2 (editor's notes).

313. See *supra* note 236 and accompanying text.

314. See Martin (pt. 6), *supra* note 312, at 378–79 (arguing that the elimination of the words "to emit bills of credit" in the Committee of Detail draft resulted in Congress not having the power); see also *supra* note 235 and accompanying text.

315. Luther Martin, *Commentary, Number V: To the Citizens of Maryland*, PHILA. FED. GAZETTE, April 10, 1788, reprinted in 17 DOCUMENTARY HISTORY, *infra* note 344, at 69, 71 (emphasis added).

316. 2 DOCUMENTARY HISTORY, *infra* note 344, at 505–06 (setting forth James Wilson's notes of Finley's remarks).

federalists used the purported congressional power to issue bills of credit as a reason to oppose the Constitution. The pseudonymous "Deliberator" wrote:

Though I believe it is not generally so understood, yet certain it is, that Congress may emit paper money, and even make it a legal tender throughout the United States; and, what is still worse, may, after it shall have depreciated in the hands of the people, call it in by taxes, at any rate of depreciation (compared with gold and silver) which they may think proper. For though no state can emit bills of credit, or pass any law impairing the obligation of contracts, yet the Congress themselves are under no constitutional restraints on these points.<sup>317</sup>

Other Antifederalists taking the same tack included John Winthrop of Massachusetts,<sup>318</sup> DeWitt Clinton of New York,<sup>319</sup> and an anonymous "Farmer" in Pennsylvania.<sup>320</sup>

The Federalists who addressed the issue also said that Congress would enjoy the power to issue paper money, however ill-advised some thought the exercise of that power might be. At the Pennsylvania ratifying convention, Federalist Jasper Yeates essentially conceded Finley's point, agreeing that "Congress alone" would be able to exercise powers such as emitting

317. *Deliberator*, Commentary, *THE N.-AM. INTELLIGENCER* (Philadelphia), Feb. 20, 1788, available at <http://www.thisnation.com/library/antifederalist/44.html>.

318. See *Agrippa*, Commentary, *To the Massachusetts Convention* (pt. 2), *MASS. GAZETTE* (Boston), Jan. 15, 1788, reprinted in 5 *DOCUMENTARY HISTORY*, *infra* note 344, at 720, 722 ("There is no bill of rights, and consequently a continental law may controul [sic] any of those principles . . . . Tender acts and the coinage of money stand on the same footing of a consolidation of power. It is a mere fallacy, invented by the deceptive powers of mr. [sic] Wilson, that what rights are not given are reserved."). "Agrippa" is believed to be Winthrop. 4 *DOCUMENTARY HISTORY*, *infra* note 344, at 303.

319. See *A Countryman*, Commentary (pt. 5), *N.Y. J.*, Jan. 17, 1788, reprinted in 20 *DOCUMENTARY HISTORY*, *infra* note 344, at 623, 624 ("By this new constitution, there are several things, which it is declared the state governments shall not do, such as emitting bills of credit, [and] making any thing but gold or silver coin a tender in payment of debts, . . . but I do not find, that this new government are [sic] hindered from doing these things."). "A Countryman" was Clinton. 20 *DOCUMENTARY HISTORY*, *infra* note 344, at 623.

320. See Commentary, *The Fallacies of the Freeman Detected by A Farmer* (pt. 1), *FREEMAN'S J.* (Philadelphia), Apr. 1788, reprinted in 3 *THE COMPLETE ANTI-FEDERALIST* at 181, 187 (stating that under the Constitution, "[t]he exclusive power of emmitting [sic] bills of credit is also reserved to Congress"). The "Farmer" essay was written in response to Tench Coxe, writing as "A Freeman." 3 *THE COMPLETE ANTI-FEDERALIST* 181 (Herbert J. Storing ed., 1981).

bills of credit.<sup>321</sup> "A Native of Virginia" argued that the ban on state emissions was justified because, "An exercise of these rights would materially interfere *with the exercise of the like by Congress.*"<sup>322</sup> In South Carolina, Federalists repeatedly represented that Congress would have power to issue paper money. One such Federalist was the distinguished physician, historian, and some-time politician David Ramsay, writing as *Civis*.<sup>323</sup> According to Ramsay, under the Constitution, "the states cannot emit money; this is not intended to prevent the emission of paper money, but only of state paper money. Is not this an advantage? To have thirteen paper currencies in thirteen states is embarrassing to commerce, and eminently so to travellers."<sup>324</sup> In the session of the South Carolina legislature that called the state ratifying convention, Robert Barnwell responded to a defense of state emissions<sup>325</sup> by averring that "it was not the state, but the Continental money, that brought about the favorable termination of the war. If to strike off a paper medium becomes necessary, Congress, by the Constitution, still have that right, and may exercise it when they think proper."<sup>326</sup> At the South Carolina ratifying convention, Charles Pinckney, who had been a prominent delegate to the federal Convention, observed, "Be-

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321. See 2 DOCUMENTARY HISTORY, *infra* note 344, at 436 (reporting Jasper Yeates as saying at the Pennsylvania ratifying convention: "It is confessed the 10th section abridges some of the powers of the state legislature, as in preventing them from coining money, [and] emitting bills of credit . . . . If state governments are prevented from exercising these powers, it will produce respectability, and credit will immediately take place. . . . Congress alone with the powers given them by this system, or similar powers, can effect these purposes." (emphasis added)).

322. A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (emphasis added).

323. *Civis* is the Latin word for "citizen."

324. CIVIS, AN ADDRESS TO THE FREEMEN OF SOUTH CAROLINA, ON THE SUBJECT OF THE FOEDERAL CONSTITUTION, PROPOSED BY THE CONVENTION, WHICH MET IN PHILADELPHIA (1787), *reprinted in* 16 DOCUMENTARY HISTORY, *infra* note 344, at 21, 23.

325. Rawlins Lowndes had argued as follows:

Paper money, too, was another article of restraint, and a popular point with many; but what evils had we ever experienced by issuing a little paper money to relieve ourselves from any exigency that pressed us? We had now a circulating medium which every body took. We used formerly to issue paper bills every year, and recall them every five, with great convenience and advantage. Had not paper money carried us triumphantly through the war, extricated us from difficulties generally supposed to be insurmountable, and fully established us in our independence? and [sic] now every thing is so changed that an entire stop must be put to any more paper emissions, however great our distress may be.

4 ELLIOT'S DEBATES, *infra* note 344, at 289-90.

326. *Id.* at 294.

sides, if paper should become necessary, the general government still possess the power of emitting it, and Continental paper, well funded, must ever answer the purpose better than state paper."<sup>327</sup>

Participants in the ratification debates cited four reasons why the Constitution should allow federal paper money but prohibit state emissions. First, the Articles of Confederation had granted Congress exclusive authority over foreign relations,<sup>328</sup> but state issues of paper money had impeded Congress's exercise of that authority.<sup>329</sup> Second, removing the power of issuing paper

327. *Id.* at 335.

328. *See* ARTS. CONFED. art. VI (giving broad authority over foreign relations only to Congress).

329. *See* Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), in *NEW HAVEN GAZETTE*, Oct. 25, 1787, reprinted in 13 *DOCUMENTARY HISTORY*, *infra* note 344, at 471:

The restraint on the legislatures of the several states respecting emitting bills of credit, making any thing but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected.

*See also* ARISTIDES, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, ADDRESSED TO THE CITIZENS OF THE UNITED STATES OF AMERICA AND PARTICULARLY TO THE PEOPLE OF MARYLAND (1788), reprinted in 15 *DOCUMENTARY HISTORY*, *infra* note 344, at 517, 538 (arguing that a ban on states issuing paper money is necessary to restore America's credit abroad); 2 *ELLIOT'S DEBATES*, *infra* note 344, at 492–93 (reporting James Wilson's remarks at the Pennsylvania ratifying convention explaining how the constitutional scheme would restore credit with foreign nations); 3 *ELLIOT'S DEBATES*, *infra* note 344, at 28 (reporting Edmund Randolph at the Virginia ratifying convention as admonishing: "Rhode Island—in rebellion against integrity—Rhode Island plundered all the world by her paper money."); *Publicola*, Commentary, *To the Freeman of the State of North Carolina*, *ST. GAZETTE OF N.C.*, Mar. 20, 1788, reprinted in 16 *DOCUMENTARY HISTORY*, *infra* note 344, at 435, 439 (stating that paper money has resulted in the unwillingness of foreigners and citizens of sister states to loan to North Carolinians); *see also* THE FEDERALIST NO. 44, *infra* note 344, at 231–32 (James Madison):

[T]he same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money, than to coin gold or silver. The power to make any thing but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of issuing a paper currency.

money from the state governments, particularly from Rhode Island's government,<sup>330</sup> would remove a source of discord and incipient trade wars between the various states.<sup>331</sup> Historian Mary

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Aristides was Alexander Contee Hanson. 15 DOCUMENTARY HISTORY, *infra* note 344, at 517. Publicola was Archibald Maclaine. 16 DOCUMENTARY HISTORY, *infra* note 344, at 435.

330. See, e.g., *To the Freemen of Pennsylvania*, *supra* note 305, at 365 ("See, in Rhode-Island, the bonds of society and the obligations of morality dissolved by paper money and tender laws."); see also PA. HERALD (Philadelphia), June 9, 1787, reprinted in 13 DOCUMENTARY HISTORY, *infra* note 344, at 132 (reporting incorrectly that the Constitutional Convention had "resolved that Rhode-Island should be considered as having virtually withdrawn herself from the union . . . [S]he shall be compelled to be responsible . . .").

One effect of Rhode Island's excessive issuance of paper money was alleged to be the depreciation of paper money in other states. Anonymous, *A Letter from a Gentleman to His Friend*, NEW ENG. WKLY. J., Feb. 18, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 29, 30.

331. See A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (referring to ban on paper money as a state ban, and arguing that an issue of paper money by one state "might defraud not only its own citizens, but the citizens of other States"); 2 ELLIOT'S DEBATES, *infra* note 344, at 171 (reporting Charles Turner, at the Massachusetts ratifying convention, referring to "the tendency of depreciating paper, and tender acts, to destroy mutual confidence, faith, and credit, to prevent the circulation of specie, and to overspread the land with an inundation, a chaos of multiform injustice, oppression, and knavery"); 2 DOCUMENTARY HISTORY, *infra* note 344, at 519 (reporting James Wilson as saying at the Pennsylvania ratifying convention: "I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel, who has his debts at the mercy of tender laws in other states?"); Publicola, *infra* note 344, at 439 (stating that paper money has resulted in the unwillingness of foreigners and citizens of sister states to loan to North Carolinians); see also Franklin, *infra* note 344, at 211 (complaining of "the prudent reserve of one colony in its emissions, being rendered useless by excess in another"); cf. 4 ELLIOT'S DEBATES, *infra* note 344, at 157 (reporting William Davie, at the North Carolina ratifying convention, emphasizing the importance of federal judicial control of state paper money and other actions that might lead to discrimination against other states).

Governor Edmund Randolph was particularly eloquent at the Virginia ratifying convention:

Are we not borderers on states that will be separated from us? Call to mind the history of every part of the world, where nations bordered on one another, and consider the consequences of our separation from the Union. Peruse those histories, and you find such countries to have ever been almost a perpetual scene of bloodshed and slaughter—the inhabitants of one escaping from punishment into the other—protection given them—consequent pursuit—robbery, cruelty, and murder. A numerous standing army, that dangerous expedient, would be necessary, but not sufficient, for the defence of such borders. Every gentleman will amplify the scene in his own mind.

. . . I have before hinted at some other causes of quarrel between the other states and us; particularly the hatred that would be generated by commercial competitions. . . Paper money may also be an additional source of disputes. Rhode Island has been in one continued train of

M. Schweitzer has concluded that this was the most important factor leading to the constitutional ban on state issues.<sup>332</sup> Third, interstate monetary uniformity<sup>333</sup> offered solid advantages for travel,<sup>334</sup> credit,<sup>335</sup> and commerce.<sup>336</sup> Before the Constitution, each state had issued its own currency, and the nominal values of these currencies varied sharply from state to state.<sup>337</sup> David Ramsay looked forward to the day when this would change:

How extremely useful and advantageous must this restraint be to those states which mean to be honest, and not to defraud their neighbors! Henceforth, the citizens of the states

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opposition to national duties and integrity; they have defrauded their creditors by their paper money. Other states have also had emissions of paper money, to the ruin of credit and commerce. May not Virginia, at a future day, also recur to the same expedient? Has Virginia no affection for paper money, or disposition to violate contracts? I fear she is as fond of these measures as most other states in the Union. The inhabitants of the adjacent states would be affected by the depreciation of paper money, which would assuredly produce a dispute with those states. This danger is taken away by the present Constitution, as it provides "that no state shall emit bills of credit."

3 ELLIOT'S DEBATES, *infra* note 344, at 75–76; *see also id.* at 82 (reporting Randolph as stating, "Rhode Island and Connecticut have been on the point of war, on the subject of their paper money").

332. Schweitzer, *infra* note 344, at 322.

333. *See* HURST, *infra* note 344, at 10–13 (stressing the need for standardization).

334. *See* CIVIS, *supra* note 324, at 23.

335. *See* Letter from Nathaniel Peaslee Sargeant to Joseph Badger (1788), in 1 NEW ENG. HIST. & GENEALOGICAL REG. 237 (1847), *reprinted* in 5 DOCUMENTARY HISTORY, *infra* note 344, at 563, 565 ("The old Confederation without Power or Energy destroyed ye Credit of ye United States. The scarcity of Cash, and ye embarrassments of ye Government, for want of some fixed System of finance has destroyed ye credit of ye individual States—different Tender acts in different States, different sorts of paper money in different States, (for almost all ye States have either paper money or tender acts.) have destroyed private Credit . . .").

336. *See* Benjamin Rush, Commentary, AMERICAN MUSEUM, Jan. 1787, *reprinted* in 13 DOCUMENTARY HISTORY, *infra* note 344, at 45, 46 ("I wish [the Convention] may add to their recommendations to each state, to surrender up to congress their power of emitting money. In this way, a uniform currency will be produced, that will facilitate trade, and help to bind the states together."); *see also* THE FEDERALIST NO. 42, *infra* note 344, at 220 (James Madison) (defending congressional regulation of foreign coin on grounds of uniformity); Harrington, Commentary, PA. GAZETTE (Philadelphia), May 30, 1787, *reprinted* in 13 DOCUMENTARY HISTORY, *infra* note 344, at 116, 118–19 (calling on the states to give up their financial powers to create a unified system, giving up "their unjust tender and commutation laws—their paper money—their oppressive taxes upon land—and their partial systems of finance").

337. *See* WRIGHT, *infra* note 344, at vi (showing, as of 1761, variations among colonial currencies per £100 sterling from par (Georgia) to £700 (South Carolina)); *see generally* Rolnick et al., *infra* note 344 (emphasizing exchange rate variability as a reason for the prohibition of state currencies).

may trade with each other without fear of tender-laws or laws impairing the nature of contracts. The citizen of South Carolina will then be able to trade with those of Rhode Island, North Carolina, and Georgia, and be sure of receiving the value of his commodities.<sup>338</sup>

Fourth, many believed that the wider scope of the federal government would reduce the possibility that paper money would be issued needlessly or for improper purposes.<sup>339</sup>

A later anecdote suggests how even strident opponents of paper money accepted the federal power to issue it. In 1819, John Adams wrote to Thomas Jefferson on the subject of recent American issues of paper money,<sup>340</sup> quoting Charles François Dupui:

[Debasing the coinage] is to steal. A theft of greater magnitude and still more ruinous is the making of paper. It is greater because in this money there is absolutely no real value. It is more ruinous because by its gradual depreciation during all the time of its existence it produces the effect which would be produced by an infinity of successive deteriorations of the coin.<sup>341</sup>

Adams added, "That is to say, an infinity of successive felonious larcenies. If this is true, as I believe it is, we Americans are the most thievish people that ever existed: we have been stealing from each other for an hundred and fifty years."<sup>342</sup> Jefferson

338. 4 ELLIOT'S DEBATES, *infra* note 344, at 335.

339. See, e.g., THE FEDERALIST NO. 10 (James Madison), *infra* note 344, at 48:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

See also 4 ELLIOT'S DEBATES, *infra* note 344, at 86 (quoting Whitmill Hill as saying at the North Carolina ratifying convention, "We can borrow money with ease, and on advantageous terms, when it shall be known that Congress will have that power which all governments ought to have. Congress will not pay their debts in paper money. I am willing to trust this article to Congress, because I have no reason to think that our government will be better than it has been.").

340. Several emissions were made as part of the war effort in the War of 1812. See *Legal Tender Cases*, 79 U.S. 457, 636 n.1 (1870) (Field, J., dissenting).

341. Letter from John Adams to Thomas Jefferson (Feb. 24, 1819), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 535 (Lester J. Cappon ed., 1959).

342. *Id.*

responded, "The paper bubble is then burst. This is what you and I, and every reasoning man, seduced by no obliquity of mind or interest, have long foreseen. Yet it's [sic] disastrous effects are not the less for having been foreseen."<sup>343</sup>

However vehement they were on the iniquity of paper money, though, these old Founders refrained entirely from questioning its constitutionality.

## CONCLUSION

According to the original understanding, the Constitution's Coinage Clause granted to Congress the express power to coin money and bestow legal tender quality upon that money. A similar power of lesser, but still broad, scope was also created by the Commerce Clause, for part of the eighteenth-century definition of "regulating commerce" was the issuance and regulation of the media of exchange.

In addition, the money thus "coined" did not need to be metallic. Paper or any other material that Congress selected would suffice. Because the power to coin paper was express, it requires no justification by the incidental powers doctrine of the Necessary and Proper Clause.

The Supreme Court's opinions in the *Legal Tender Cases* did rely on the Necessary and Proper Clause, and to that extent their reasoning was at odds with the original understanding. However, the outcome of those cases—that Congress had authority to issue legal tender paper money—was correct as a matter of original understanding. Originalists or others propounding interpretive theories, therefore, need not make any special accommodation for the holdings of the *Legal Tender Cases*.<sup>344</sup>

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343. Letter from Thomas Jefferson to John Adams (Nov. 7, 1819) in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 341, at 546.

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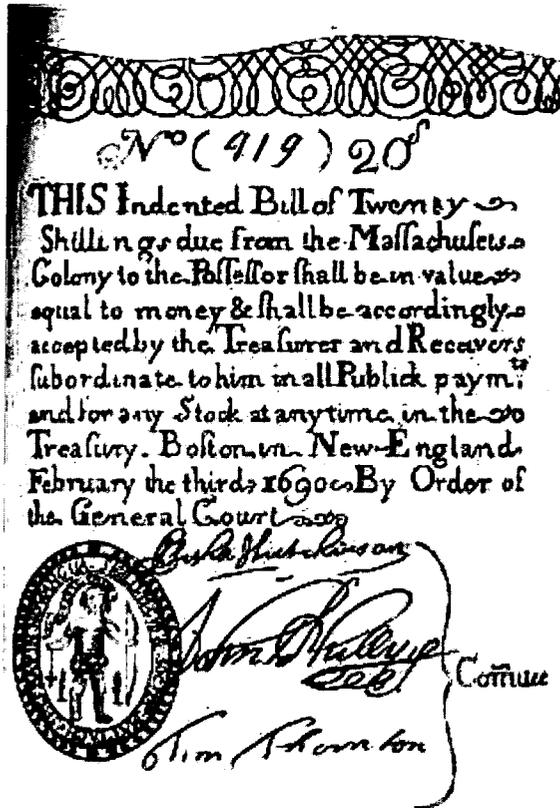
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# THE ORIGINAL MEANING OF THE FREE EXERCISE CLAUSE: THE EVIDENCE FROM THE FIRST CONGRESS

VINCENT PHILLIP MUÑOZ\*

Despite the vast quantity of research devoted to understanding religion and the American Founding, the original meaning of the First Amendment's Free Exercise Clause remains a matter of significant dispute. In academic literature and in Supreme Court opinions, two leading interpretations have emerged. One side understands the Free Exercise Clause to grant religious individuals and institutions exemptions from generally applicable laws that incidentally burden religious exercise, absent a compelling state interest in the law's enforcement. Initially adopted by the Supreme Court in 1963 in *Sherbert v. Verner*,<sup>1</sup> the exemption interpretation received its leading originalist defense in 1990 by distinguished law professor (and now federal appellate judge) Michael McConnell.<sup>2</sup> Justice Sandra Day O'Connor later adopted Judge McConnell's arguments in her dissenting opinion in the 1997 case, *City of Boerne v. Flores*.<sup>3</sup>

The other interpretation of the Free Exercise Clause denies that the First Amendment encompasses such exemptions. The

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1. 374 U.S. 398 (1963). In *Sherbert*, the Court adopted the exemption interpretation apart from concerns about the Free Exercise Clause's original meaning. *See id.*

2. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Non-originalist defenses of the exemption interpretation include: Steven L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991) [hereinafter Gordon, *Free Exercise on the Mountaintop*]; James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65 (1997); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Steven D. Smith, *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805 (1996); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995).

3. 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting).

non-exemption interpretation, first articulated by the Court in 1878 in *Reynolds v. United States*,<sup>4</sup> was revived for most free exercise issues in the 1990 case, *Employment Division v. Smith*.<sup>5</sup> Justice Antonin Scalia, *Smith's* author, has vigorously championed this position, with the concurrence of numerous academic commentators.<sup>6</sup> In *Smith*, Justice Scalia defended his interpretation without referring to the Founders,<sup>7</sup> but in *Boerne* he mounted a direct critique of exemptions on historical grounds.<sup>8</sup> Advocates of both the exemption and the non-exemption interpretations of the Free Exercise Clause thus appeal to the Founders and purport to embrace the original understanding of the Free Exercise Clause. It would seem that both sides cannot be correct.

In an effort to help resolve the debate among both scholars and Justices over the most accurate interpretation of history, this Article gathers and examines the relevant evidence available from the First Congress regarding the Clause's original

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4. 98 U.S. 145 (1878).

5. 494 U.S. 872 (1990). For Judge McConnell's response to *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For discussions of *Smith*, including the extent to which it overturned *Sherbert*, see CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH 187-90 (2000); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005); Gordon, *Free Exercise on the Mountaintop*, *supra* note 2.

6. Academic critics of the exemption interpretation of the Free Exercise Clause include: MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) [hereinafter Hamburger, *An Historical Perspective*]; Philip A. Hamburger, *More is Less*, 90 VA. L. REV. 835 (2004) [hereinafter Hamburger, *More is Less*]; Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1994) [hereinafter West, *The Right to Exemptions*].

7. See McConnell, *supra* note 5, at 1116-17; see also Gordon, *Free Exercise on the Mountaintop*, *supra* note 2, at 93, 114.

8. *Boerne*, 521 U.S. at 537-44 (Scalia, J., concurring).

meaning.<sup>9</sup> This Article contends that the drafting of the Free Exercise Clause sheds almost no light on the text's original meaning. In drafting what would become the Second Amendment, however, the First Congress directly considered and rejected a constitutional right to religious-based exemption from militia service. When it considered conscientious exemption, moreover, no member of Congress suggested that such an exemption might be part of the right to religious free exercise. The records of the First Congress therefore provide strong evidence against the exemption interpretation of the Free Exercise Clause. Although some scholars have taken note of the possible relevance of the drafting of the Second Amendment to free exercise jurisprudence, its significance has been underappreciated.<sup>10</sup> Recent scholarship on the topic has overlooked the Second Amendment debate altogether.<sup>11</sup> Likewise, in *Boerne*, neither

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9. One could, of course, consider other historical evidence. For example, Professor Bradley argues that judicially-mandated religious free exercise exemptions are inconsistent with antebellum judicial interpretation, at both the state and federal levels, of constitutional guarantees of the free exercise of religion. See Bradley, *supra* note 6. Professor Hamilton reports that latter eighteenth-century sermons reveal that the religious leaders of the day did not envision a society that would permit religion-based exemptions from generally applicable laws. See Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387 (2002). For a different type of argument based on history, see Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996).

10. Professors Bradley and Hamburger, the leading critics of the exemption approach from an historical standpoint, mention the drafting of what would become the Second Amendment only in passing. See Bradley, *supra* note 6, at 268; Hamburger, *An Historical Perspective*, *supra* note 6, at 928. Other scholarship that has noted the possible relevance to interpreting the Free Exercise Clause of the drafting of what would become the Second Amendment includes: WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 54–55 (1976); Marshall, *supra* note 6, at 376 n.95; West, *The Right to Exemptions*, *supra* note 6, at 395–400.

11. Recent scholarship that attempts to ascertain the original meaning of the Free Exercise Clause but fails to examine the drafting of the Second Amendment includes: NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005); 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 15–25 (2006). Professor Michael Malbin's oft-cited pamphlet, *supra* note 6, may have discouraged scholars from investigating the records of the First Congress to ascertain the original meaning of the Free Exercise Clause. The opening paragraph of Malbin's chapter on the Free Exercise Clause begins:

The meaning of the free exercise clause is still unclear. After reading the congressional debates, we can guess that its purpose may have had something to do with the relationship between conscientious belief and its expression, but we are not given enough material to be more precise than that. For this, we shall have to look at the contemporary historical record.

Justice O'Connor nor Justice Scalia considered the records related to the drafting of the Second Amendment in their description of historical evidence.

Part I of this Article reviews the different originalist arguments articulated by Justices O'Connor and Scalia in their opposing opinions in *Boerne*. Part II begins the Article's review of the records of the First Congress. Through a detailed examination of the drafting of what would become the Free Exercise Clause, Part II shows why almost no conclusions can be drawn about the Clause's original meaning from those records. Part III examines the insufficiently explored drafting of what would become the Second Amendment, documenting Congress's consideration and rejection of a right of conscientious exemption from militia service. That Congress both rejected religious exemptions from militia service and appears to have considered such an exemption entirely without reference to what would become the First Amendment strongly suggests that the members of the First Congress did not understand the Free Exercise Clause to grant religious individuals exemptions from generally applicable laws.

#### I. THE ORIGINALIST TURN IN FREE EXERCISE JURISPRUDENCE: THE O'CONNOR-MCCONNELL, SCALIA-HAMBURGER DISPUTE

After turning to the Founders to guide its first substantive interpretation of the Free Exercise Clause,<sup>12</sup> the Supreme Court's twentieth-century free exercise jurisprudence developed mostly without originalist arguments.<sup>13</sup> In *Cantwell v. Connecti-*

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MALBIN, *supra* note 6, at 19. Malbin then proceeded to deduce conclusions about the original meaning of the Free Exercise Clause from an investigation of the adoption of Article XVI of the 1776 Virginia Declaration of Rights and Jefferson and Madison's legislative efforts to establish religious freedom in Virginia from 1777 to 1785. His pamphlet, which was one of the first scholarly investigations of the subject, devoted almost no attention to the records of the First Congress for the purposes of understanding religious free exercise. His discussion of the drafting of what would become the Second Amendment was limited to one brief footnote. *See id.* at 39 n.4.

12. *Reynolds v. United States*, 98 U.S. 145, 162–64 (1878).

13. For a discussion of the Court's use of history in First Amendment religion clause jurisprudence, see Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 567–71 (2006). A notable exception to the general absence of historical arguments in free exercise jurisprudence between 1950 and 1997 is *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), in which Chief Justice Burger cited James Madison to strike down a Tennessee constitutional provision that barred religious ministers from holding certain political offices. *Id.* at 623–26. Free exercise cases before

cut,<sup>14</sup> the 1940 case that incorporated the Free Exercise Clause against the states, and in *Sherbert v. Verner*,<sup>15</sup> the precedent-setting case that governed free exercise jurisprudence from 1963 until 1990, the Court did not attempt to discover the text's original meaning. In *Smith*, similarly, the Court dismantled much of *Sherbert's* balancing test without relying on historical arguments.<sup>16</sup> In 1993, Justice David Souter called for a reconsideration of *Smith*, in part because that case failed to consider the original meaning of the Free Exercise Clause.<sup>17</sup> Justice Souter labeled the absence of history in the Court's free exercise jurisprudence "curious," and noted that the matter stood in "stark contrast" to the Court's Establishment Clause jurisprudence.<sup>18</sup> In 1997, in her dissenting opinion in *Boerne*, Justice O'Connor heeded Justice Souter's call for an originalist reconsideration of *Smith*.

#### A. Justice O'Connor's Originalist Defense of Exemptions

The *Boerne* case was brought to the Court by Patrick Flores, the Catholic Archbishop of San Antonio.<sup>19</sup> Archbishop Flores had filed a lawsuit against the city of Boerne, Texas after local zoning authorities, relying on an historical preservation ordinance, denied the archdiocese a building permit to enlarge a church.<sup>20</sup> Archbishop Flores challenged the permit denial under the Religious Freedom Restoration Act (RFRA),<sup>21</sup> a 1993 federal

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*McDaniel* that included passing references to the Framers include: *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961), and *Wisconsin v. Yoder*, 406 U.S. 205, 218 n.9 (1972).

14. 310 U.S. 296 (1940). It is impossible to know for certain why the Court eschewed attention to the Framers in *Cantwell*, but one reason suggests itself. In *Reynolds*, the Court interpreted the Free Exercise Clause in light of the Jeffersonian distinction between acts and opinions; specifically, the Court held that Congress was deprived of legislative power over opinions but maintained jurisdiction over actions. *Reynolds*, 98 U.S. at 164. The Connecticut statute under review in *Cantwell*, however, regulated solicitations, a type of action. 310 U.S. at 301. The Jeffersonian distinction between beliefs and actions, accordingly, did not clearly support the Court's decision.

15. 374 U.S. 398 (1963).

16. See *Employment Div. v. Smith*, 494 U.S. 872, 883–89 (1990); Gordon, *Free Exercise on the Mountaintop*, *supra* note 2, at 93.

17. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring).

18. *Id.* at 575. Judge McConnell made the same point in his 1990 *Harvard Law Review* article. McConnell, *supra* note 2, at 1413–14.

19. *Boerne*, 521 U.S. at 511–12.

20. *Id.*

21. 42 U.S.C. § 2000bb (2000).

law that attempted to overturn *Smith* and reinstitute the “*Sherbert test*” for free exercise jurisprudence.<sup>22</sup> Under RFRA, generally applicable laws that had the effect of “substantially burden[ing] a person’s exercise of religion” were to be held unenforceable unless the government could demonstrate that the burden: “(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that . . . interest.”<sup>23</sup> In *Boerne*, the Court ruled against Archbishop Flores by a vote of 6-3, striking down RFRA as applied to state governments.<sup>24</sup> Justice Anthony Kennedy’s majority opinion found that Congress had exceeded its authority under Section Five of the Fourteenth Amendment by attempting to make a substantive change in (as opposed to remedying a violation of) a constitutional right.<sup>25</sup>

Unlike Justice Kennedy’s majority opinion, which relied on separation of powers arguments, Justice O’Connor’s dissent focused on the meaning of religious free exercise. Specifically, Justice O’Connor proposed to examine “the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause”—a type of inquiry, she pointed out, that “the Court in *Smith* did not undertake.”<sup>26</sup> Justice O’Connor did not, however, conduct an examination of the First Amendment’s text or its drafting in the First Congress. “Neither the First Congress nor the ratifying state legislatures,” she asserted, “debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment’s free exercise protection.”<sup>27</sup> She went so far as to say that “it is not exactly clear what the Framers thought the phrase [‘free exercise’] signified.”<sup>28</sup> Nonetheless, Justice O’Connor suggested that other sources that “supplement the legislative history”<sup>29</sup> could be consulted. Following closely Judge McConnell’s 1990 *Harvard Law Review* article, Justice O’Connor focused on the text of early American legal docu-

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22. For a defense of Congress’s actions, see Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 895–97 (1994).

23. 42 U.S.C. § 2000bb-1 (2000).

24. *Boerne*, 521 U.S. at 536.

25. *Id.* at 519.

26. *Id.* at 548 (O’Connor, J., dissenting).

27. *Id.* at 550 (citing LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 173 (1972)).

28. *Id.*

29. *Id.* at 550.

ments (in particular, state constitutions adopted during the Founding period), the Founders' political practice, and the writings of the leading Founders (especially James Madison).<sup>30</sup> The evidence in these historical records, she concluded, "casts doubt on the Court's current interpretation [under *Smith*] of the Free Exercise Clause" and "reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion."<sup>31</sup>

### 1. Textual "Provisos" for Religious Exemptions

According to Justice O'Connor, state constitutions adopted during and after the American Revolution protected religious freedom by establishing a balancing test that allowed judges to grant exemptions from generally applicable but burdensome laws.<sup>32</sup> She noted that "[b]y 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution,"<sup>33</sup> and that these state provisions "were typically longer and more detailed than the Federal [First Amendment] Free Exercise Clause."<sup>34</sup> She suggested, furthermore, that the state provisions "are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty," because "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."<sup>35</sup>

Justice O'Connor discussed the free exercise clauses of four state constitutions—New York, New Hampshire, Maryland; and Georgia—as well as a similar provision in the Northwest Ordinance of 1787, a federal law enacted contemporaneously with the drafting of the Constitution and then reenacted by the

30. *Id.* at 549–64.

31. *Id.* at 549.

32. *Id.* at 552–53. Justice O'Connor argued that evidence of the exemption-granting balancing approach could also be found in the earliest colonial legal documents recognizing religious liberty. Evidence cited by Justice O'Connor includes charters and laws from colonial Carolina, Maryland, New Jersey, New York, and Rhode Island. *See id.* at 551–52.

33. *Id.* at 552–53 (citing McConnell, *supra* note 2, at 1455).

34. *Id.* at 553.

35. *Id.*; *see also* McConnell, *supra* note 2, at 1456.

First Congress.<sup>36</sup> To take just one example, New York's 1777 Constitution provided:

[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.<sup>37</sup>

Justice O'Connor focused on the proviso, "*Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." She interpreted this text to set forth the condition for when religious exercise could be circumscribed legitimately—that is, that the state could burden religion only when necessary to prevent "acts of licentiousness" or "practices inconsistent with the peace or safety" of the state.<sup>38</sup> Were this not what the proviso meant, Justice O'Connor reasoned:

[T]here would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State." Such a proviso would have been superfluous.<sup>39</sup>

The presence of provisos demarking the narrow conditions for when the state could burden religion signaled to Justice O'Connor that the Founders foresaw that generally applicable laws would burden religious exercise, and that they intended to exempt religious citizens from such laws in all but the most important cases.<sup>40</sup>

Tracking Judge McConnell's article, Justice O'Connor derived further support for the judicial balancing approach to free exercise from the history of Virginia, whose legislature,

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36. *Boerne*, 521 U.S. at 553–54 (O'Connor, J., dissenting). For a full discussion of state constitutional protections of religious free exercise from the time before the Constitution, see McConnell, *supra* note 2, at 1455–66.

37. N.Y. CONST. of 1777 art. XXXVIII, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 178 (William F. Swindler ed., 1978).

38. *Boerne*, 521 U.S. at 554 (O'Connor, J., dissenting) (quotation marks omitted).

39. *Id.* at 554–55.

40. *See id.* at 555.

she said, “may have debated the issue most fully.”<sup>41</sup> According to Justice O’Connor, when Virginia drafted Article XVI of its 1776 Declaration of Rights, its legislature debated what standard should be used to grant exemptions from religiously burdensome laws.<sup>42</sup> George Mason’s initial draft declared that “all men should enjoy the fullest toleration in the exercise of religion . . . unless, under colour of religion, any man disturb the peace, the happiness, or safety of society.”<sup>43</sup> Unhappy with Mason’s language, the young James Madison proposed: “all men are equally entitled to the full and free exercise of [religion] . . . unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.”<sup>44</sup> According to Justice O’Connor, “both Mason’s and Madison’s formulations envisioned that, when there was a conflict, a person’s interest in freely practicing his religion was to be balanced against state interests.”<sup>45</sup> If the right to reli-

41. *Id.* For a thorough discussion of the debate in Virginia, see McConnell, *supra* note 2, at 1462–63.

42. *Boerne*, 521 at 555–56 (O’Connor, J., dissenting).

43. *Id.* at 555. The full text of Mason’s initial draft was:

That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be (directed) only by reason and conviction, not by force or violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

George Mason, Committee Draft of the Virginia Declaration of Rights, *reprinted in* 1 PAPERS OF GEORGE MASON 1725–1792, at 284–85 (Robert A. Rutland ed., 1970). For a comprehensive account of the drafting of Article XVI of the Virginia Declaration of Rights, see Daniel L. Dreisbach, *George Mason’s Pursuit of Religious Liberty in Revolutionary Virginia*, 108 VA. MAG. HIST. & BIOGRAPHY 5 (2000).

44. *Boerne*, 521 U.S. at 555–56 (O’Connor, J., dissenting) (emphasis removed). The full text of Madison’s initial revision was:

That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered.

Gaillard Hunt, *James Madison and Religious Liberty*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 163, 166–67 (1902).

45. *Boerne*, 521 U.S. at 556 (O’Connor, J., dissenting); *see also* McConnell, *supra* note 2, at 1462–63.

gious free exercise did not include exemptions from some generally applicable laws, she said, the Mason-Madison debate would have been “irrelevant.”<sup>46</sup> Although the Virginia legislature did not adopt any proviso, Justice O’Connor concluded that it “[p]resumably” intended to adopt a balancing standard that struck “some middle ground between Mason’s narrower and Madison’s broader notions of the right to religious freedom.”<sup>47</sup>

## 2. *The Founders’ Exemption-Granting Practices and Rhetoric*

Justice O’Connor also found that the political practice of the colonies and the early American states “bears out” the conclusion that the Framers believed religion should be accommodated as extensively as possible.<sup>48</sup> Carolina, she said, interpreted its 1665 charter to allow Quakers to enter pledges in a book instead of swearing oaths when the Quakers found the latter objectionable.<sup>49</sup> Some colonies and, later, states with established churches and legally-enforced religious taxes allowed taxpayers to support their own church or exempted religious dissenters from religious assessments.<sup>50</sup> Some states exempted Quakers from military service on account of their religiously inspired pacifism.<sup>51</sup> Although Justice O’Connor acknowledged

46. *Boerne*, 521 U.S. at 556 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1463.

47. *Boerne*, 521 U.S. at 557 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1463. Virginia adopted the following text, lacking a proviso, as Article XVI of its Declaration of Rights:

That Religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

Dreisbach, *supra* note 43, at 16.

48. *Boerne*, 521 U.S. at 557 (O’Connor, J., dissenting); see also McConnell, *supra* note 2, at 1466–71. For a recent discussion of religious-based exemptions from generally applicable laws in colonial America and during the Founding era, see Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006).

49. *Boerne*, 521 U.S. at 558 (O’Connor, J., dissenting) (internal quotation marks omitted) (quoting THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 56 (1986)). Justice O’Connor also noted that by 1789 almost every state had enacted oath exception legislation. *Id.* (citing ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 62 (1990)).

50. See *id.* at 559 (citing McConnell, *supra* note 2, at 1469).

51. See *id.* at 558 (citing McConnell, *supra* note 2, at 1468). Justice O’Connor also noted that the Continental Congress passed a resolution in July 1775 recognizing

that early American legislatures, rather than courts, granted exemptions based on religion, she reasoned,

these were the days before there *was* a Constitution to protect civil liberties—judicial review did not yet exist. These legislatures apparently believed that the appropriate response to conflicts between civil law and religious scruples was, where possible, accommodation of religious conduct. It is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded.<sup>52</sup>

### 3. *The Founders' Authoritative Documents*

The practice of religious accommodation adopted in the Founding period's laws, Justice O'Connor said, was also expressed in authoritative documents setting forth the views of leading Founders.<sup>53</sup> Justice O'Connor placed particular emphasis on James Madison's *Memorial and Remonstrance*.<sup>54</sup> In the *Memorial*, Madison gave two reasons why the right to religious free exercise was "unalienable": (1) because a person's opinions "cannot follow the dictates of other[s]"; and (2) because religion entails "a duty towards the Creator" that is "precedent both in order of time and degree of obligation, to the claims of Civil So-

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the legitimacy of religious-based conscientious exemption from military service. The resolution stated:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

*Id.* at 558–59 (quoting Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 187, 189 (Worthington C. Ford ed., 1905)).

52. *Id.* at 559–60. For an elaboration of this argument, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693–94 (1991); Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 830–32 (1998) [hereinafter McConnell, *Freedom From Persecution*]. For a criticism of this argument, see Bradley, *supra* note 6, at 267–72; West, *The Right to Exemptions*, *supra* note 6, at 377–78. For further discussion of this point, see *infra* notes 61–68, 76–81, 156–61 and accompanying text.

53. See *Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting).

54. For Judge McConnell's discussion of Madison, see McConnell, *supra* note 2, at 1452–55.

ciety.<sup>55</sup> Madison's argument that duties to God were superior to duties to civil authorities was, according to Justice O'Connor, "consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law."<sup>56</sup> Justice O'Connor argued that statements by Thomas Jefferson<sup>57</sup> and George Washington<sup>58</sup> also supported this view.

#### 4. Justice O'Connor's Conclusions

From early American legal documents, the political practices of the Framers, and the authoritative statements of leading Founders, Justice O'Connor drew three general conclusions. First, "these early leaders accorded religious exercise a special constitutional status."<sup>59</sup> Second, "all agreed that government interference in religious practice was not to be lightly countenanced."<sup>60</sup> Third, "all shared the conviction that 'true religion and good morals are the only solid foundation of public liberty

55. *Boerne*, 521 U.S. at 561 (O'Connor, J., dissenting) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON 1783-1787, at 184-85 (Gaillard Hunt ed., 1901)).

56. *Id.* at 561. For a competing interpretation of Madison's *Memorial and Remonstrance*, see Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 20-24 (2003).

57. Justice O'Connor pointed out that in 1808, Jefferson wrote that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." *Boerne*, 521 U.S. at 562 (O'Connor, J., dissenting) (quoting Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON 428, 428-29 (Andrew A. Lipscomb ed., 1904)). She also noted that Jefferson said he believed that "[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." *Id.* (quotation marks omitted).

58. Justice O'Connor noted that as President, Washington wrote to a group of Quakers:

[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

*Id.* at 562 (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11, 11 (Edward F. Humphrey ed., 1932)). For a competing interpretation of Washington's letter to the Quakers, see Vincent Phillip Muñoz, *George Washington on Religious Liberty*, 65 REV. POL. 11, 25-27 (2003).

59. *Boerne*, 521 U.S. at 563 (O'Connor, J., dissenting).

60. *Id.* at 564 (citing ADAMS & EMMERICH, *supra* note 49, at 31).

and happiness.”<sup>61</sup> These significant historical sources, Justice O’Connor concluded, led to the finding that:

[T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer’s conduct is in tension with a law of general application.<sup>62</sup>

### B. Justice Scalia’s Originalist Response

Justice Scalia’s concurring opinion in *Boerne* took direct aim at Justice O’Connor’s dissent, contending that it misinterpreted and misapplied the evidence about the Founders.<sup>63</sup> Similar to how Justice O’Connor’s historical arguments tracked Judge McConnell’s 1990 *Harvard Law Review* article, Justice Scalia’s historical analysis was informed by an article published by distinguished church-state scholar Philip Hamburger.<sup>64</sup>

Following Professor Hamburger’s critique of Judge McConnell’s article, Justice Scalia challenged Justice O’Connor’s interpretation of early American legal documents.<sup>65</sup> He concluded that even if the Framers conceived that generally applicable laws were subject to judicial challenge under state or federal free exercise clauses—which Justice Scalia said was questionable<sup>66</sup>—Founding-era state constitutions demonstrated the constitutional legitimacy of generally applicable laws that indirectly burden religious exercise.<sup>67</sup> Justice Scalia cited New York’s Constitution of 1777 as an example.<sup>68</sup> Its proviso, to recall, stated that “the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”<sup>69</sup> According to Justice

61. *Id.* (quoting CURRY, *supra* note 49, at 219).

62. *Id.*

63. *Id.* at 537 (Scalia, J., concurring in part) (“The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent’s interpretation of the Free Exercise Clause.”).

64. See, e.g., *id.* at 538 (citing Hamburger, *An Historical Perspective*, *supra* note 6).

65. For Professor Hamburger’s discussion of Founding-era state constitutions, see Hamburger, *An Historical Perspective*, *supra* note 6, at 918–26.

66. *Boerne*, 521 U.S. at 538–39 (Scalia, J., concurring in part).

67. *Id.* at 539–40.

68. *Id.* at 539. For Professor Hamburger’s discussion of New York’s constitution, see Hamburger, *An Historical Perspective*, *supra* note 6, at 924–26.

69. N.Y. CONST. of 1777, art. XXXVIII, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 37, at 178.

Scalia, the text did not imply that a state could indirectly burden a religious practice only when such burdens were absolutely necessary to maintain peace or safety. "At the time these provisos were enacted," he argued, "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws."<sup>70</sup> Quoting Professor Hamburger, Justice Scalia continued: "[T]he disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."<sup>71</sup> Exactly contrary to Justice O'Connor, Justice Scalia concluded that the provisos explicitly recognized the legitimacy of indirectly prohibiting religiously motivated illegal actions.

Justice Scalia also disputed Justice O'Connor's contention that the Framers' political efforts to accommodate religions should guide judicial interpretations of the Free Exercise Clause. Such accommodations, he pointed out, were made by legislative bodies, and that "legislatures sometimes (though not always) found it 'appropriate' to accommodate religious practices does not establish that accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause."<sup>72</sup> "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable," Justice Scalia continued, "is not to say that it is constitutionally required."<sup>73</sup> Had the Framers understood religious exemptions to be constitutionally required, either by state constitutions or by the Federal Constitution,

it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, none exists.<sup>74</sup>

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70. *Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part).

71. *Id.* at 540 (quoting Hamburger, *An Historical Perspective*, *supra* note 6, at 918–19).

72. *Id.* at 541.

73. *Id.* (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)). For a more thorough elaboration of Justice Scalia's point, see Bradley, *supra* note 6, at 267–72. For an argument that the exemption interpretation does not fit "entirely comfortably" with the general structure of government created by the Constitution, see Tushnet, *supra* note 6, at 1697–99.

74. *Boerne*, 521 U.S. at 542–43 (Scalia, J., concurring in part) (citing McConnell, *supra* note 2, at 1504, 1506–11). For an elaboration of this argument, see Bradley, *supra* note 6, at 267–72.

Justice Scalia similarly dismissed Justice O'Connor's appeal to the writings of Madison and Washington.<sup>75</sup> "There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable)," Justice Scalia asserted, "as opposed to what was thought to be legislatively or even morally desirable."<sup>76</sup> Madison's *Memorial and Remonstrance*, he noted, made a legislative, not a judicial, argument.<sup>77</sup> In his letter to the Quakers, George Washington expressed a similar "wish and desire" that the Quakers be accommodated, but did not state that Quakers possessed a constitutional right to be exempt from military service.<sup>78</sup> "These and other examples offered by [Justice O'Connor's] dissent reflect the speakers' views of the 'proper' relationship between government and religion," Justice Scalia concluded, "but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship."<sup>79</sup>

*C. The O'Connor-McConnell, Scalia-Hamburger Dispute  
and Evidence Not Considered*

The Scalia-Hamburger non-exemption interpretation of the Free Exercise Clause accounts better for the considered historical evidence than the O'Connor-McConnell balancing approach.<sup>80</sup> Regarding the provisos in early American legal documents, Professor Hamburger argues convincingly that the early American state constitutions included "peace and safety" caveats to indicate that the state legitimately *could* curtail religiously motivated practices when they violated otherwise valid laws.<sup>81</sup> Judge McConnell's interpretation of state constitution "peace and safety" provisos mistakenly assumes that the caveats withdrew exemptions only from those actions that invaded the rights of others.<sup>82</sup> The texts of the provisos, however, are not that limited. Maryland's caveat, for example, states:

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75. For Professor Hamburger's discussion of Madison, see Hamburger, *An Historical Perspective*, *supra* note 6, at 926–29.

76. *Boerne*, 521 U.S. at 541 (Scalia, J., concurring in part).

77. *Id.* at 541–42.

78. *Id.* at 542.

79. *Id.*

80. Judge McConnell, of course, disagrees. See McConnell, *Freedom From Persecution*, *supra* note 52, at 832–47.

81. See Hamburger, *An Historical Perspective*, *supra* note 6, at 917–21; see also Hamburger, *More is Less*, *supra* note 6, at 839–57.

82. See McConnell, *supra* note 2, at 1464.

[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless under colour of religion any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights.<sup>83</sup>

If the O'Connor-McConnell interpretation is correct, Maryland's proviso should mention injury to others as the sole grounds for denying an exemption. Instead, the proviso also includes disturbing "the good order, peace or safety of the State" and infringing the "laws of morality." The free exercise provisos of the constitutions of New York and South Carolina similarly include "acts of licentiousness."<sup>84</sup> The broad language of these caveats belies the O'Connor-McConnell interpretation. Even if the caveats were included to indicate the grounds for denying exemptions, the realm of exemption ineligible activity would be far broader than Judge McConnell and Justice O'Connor recognize. Rather than indicating only that behavior that injures others is exemption ineligible, the sweeping coverage of the caveats would mean that almost all otherwise illegal behavior—actions that "disturb the good order, peace or safety of the State," that "infringe the laws of morality," and that "injure others"—would not be protected under the guarantee of religious freedom.<sup>85</sup>

A more likely conclusion, however, is that Judge McConnell and Justice O'Connor fundamentally misread the intention behind the provisos. The caveats were not included to signal that the right to religious free exercise meant a presumptive right to exemptions for all but a narrow class of activity. Instead, their general, sweeping nature suggests that they were included to indicate that the right to religious free exercise *did not* grant religious individuals permission to break any law.<sup>86</sup>

Justice Scalia's argument that what some state legislatures did at the time of the Founding does not dictate what is constitutionally required today is also persuasive.<sup>87</sup> The mere existence of some religious exemptions granted by the legislative

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83. MD. DECLARATION OF RIGHTS of 1776, art. 33.

84. N.Y. CONST. of 1777, art. XXXVIII; S.C. CONST. of 1790, art. VIII, § 1.

85. See Hamburger, *An Historical Perspective*, *supra* note 6, at 918–19.

86. *Id.* at 918–21.

87. For a concurring opinion, see Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. J. 555, 560–61 (1998).

and executive branches at the time of the Founding does not imply that the Framers meant to include a constitutional right to exemptions enforced by the judiciary through the Free Exercise Clause.<sup>88</sup> As Professor Bradley points out, Judge McConnell assumes that the power to make religious exemptions passed from the legislature to the judiciary with the advent of judicial review,<sup>89</sup> a point for which Judge McConnell provides no support.<sup>90</sup> Justice O'Connor, following Judge McConnell, made the same assumption. Moreover, as Professor Bradley documents, no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions.<sup>91</sup> Thus, early American courts themselves *did not* understand exemptions to pass from the legislature to the judiciary with the advent of judicial review.<sup>92</sup>

Although Justice Scalia's arguments, bolstered by the work of Professors Hamburger and Bradley, may be sufficient to refute all of Justice O'Connor's arguments in *Boerne*, they do not exhaust the originalist case against exemptions. Justice Scalia responded only to Justice O'Connor's arguments, and she did not consider the records of the First Congress. Justice O'Connor bypassed the subject because, in her words, "[n]either the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise pro-

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88. Regarding the relevance of legislatively-granted religious exemptions at the time of the Founding, Professor Hamburger writes: "[T]he issue whether an individual was understood to have a general constitutional right of religious exemption from civil laws is hardly the same issue as whether statutes or, occasionally, constitutions granted exemptions with respect to a few specific matters." Hamburger, *An Historical Perspective*, *supra* note 6, at 929.

89. See Bradley, *supra* note 6, at 267.

90. See *id.* at 267–72; see also Hamburger, *An Historical Perspective*, *supra* note 6, at 931–32 (discussing the Framers' understanding of the role of the judiciary); West, *The Right to Exemptions*, *supra* note 6, at 377–80.

91. See Bradley, *supra* note 6, at 276–95.

92. After an exhaustive survey of early American state court religious liberty cases, Professor Bradley comments:

It should be abundantly clear by now that the ratifiers, and succeeding generations of Americans, were hardly striving for "neutrality of effect" [exemptions]. Case after case recognized incidental, disproportionate burdens upon believers, particularly upon non-Protestants. Case after case held that, so long as neutrality of reasons was abided—provisionally, where that pertained to a certain class of actions—constitutional guarantees were not implicated.

Bradley, *supra* note 6, at 295.

tection."<sup>93</sup> Justice O'Connor's assertion is only partially true and by no means exhaustive. Read in isolation, the drafting of the Free Exercise Clause is unilluminating, as the next Part of this Article shows. When read in light of the drafting of what became the Second Amendment, however, the records of the First Congress provide strong evidence against the O'Connor-McConnell exemption interpretation—evidence that neither Justice O'Connor nor Justice Scalia discussed in their opinions in *Boerne*.

## II. THE DRAFTING OF THE FREE EXERCISE CLAUSE

Although not decisive in itself, an examination of the drafting of the Free Exercise Clause is necessary to offer a complete account of the records of the First Congress. It is also necessary to frame the discussion of the drafting of what became the Second Amendment, the importance of which is explained in Part III of this Article.

### A. Submitted Free Exercise Amendments

The genesis of the Bill of Rights as a whole, and the Free Exercise Clause in particular, lies in the Anti-Federalists' criticisms of the proposed Constitution.<sup>94</sup> Regarding religious liberty, Anti-Federalists argued that the Constitution failed to protect the right of religious "free exercise"<sup>95</sup> and the right to worship according to the dictates of "conscience,"<sup>96</sup> terms they appear to

93. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997).

94. For a superb discussion of the role of the Anti-Federalists in the creation of the Bill of Rights, see ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 36–48 (1997).

95. See, for example, the Federal Farmer's discussion of the rights "which ought to be established as a fundamental part of the national system." *Letters from The Federal Farmer No. 4*, POUGHKEEPSIE COUNTRY J., Oct. 12, 1787, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 245, 250 (Herbert J. Storing ed., 1981). Perhaps the most articulate of the Anti-Federalists, he declared:

It is true, we [the people of the United States] are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact. There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons.

*Id.* at 249. The Federal Farmer also considered "trials by jury in civil causes" and "the cross examining [of] witnesses" as "essential." *Id.*

96. For example, the Anti-Federalist "Centinel" said:

have used interchangeably.<sup>97</sup> Anti-Federalists clearly conceived of religious free exercise as an individual right<sup>98</sup> but, unfortunately, they did not define with precision what they meant by that right. The proposed amendments that emerged from the ratification struggle reflect the Anti-Federalists' lack of clarity.

Of the seven states that included amendments with their official notices of ratification, five submitted alterations concerning religion.<sup>99</sup> All five states' proposals included some version of the right to religious liberty, but none defined it. Virginia proposed:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of con-

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The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus*; and trial by jury for all crimes, except in case of impeachment: but there is no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent; and that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship . . . .

*Letters of Centinel No. 2*, PHILA. INDEP. GAZETTEER, Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 143, 152.

97. McConnell, *supra* note 2, at 1488.

98. I disagree with Steven D. Smith, who argues that the original meaning of the Free Exercise Clause primarily involves a concern with federalism. Professor Smith does not consider the Anti-Federalists and how their concerns led to the adoption of the Bill of Rights. Ignoring the Anti-Federalists leads Smith to overlook how the terms "free exercise" and "liberty of conscience" were used to refer to the individual right of religious freedom, and thereby leads him to conclude, mistakenly, that the Free Exercise Clause was concerned with federalism. See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 35–43 (1995).

99. The seven states that submitted amendments were Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island (belatedly). Massachusetts's proposed amendments did not address religion. I omit from discussion South Carolina's proposal, which sought to amend the No-Religious-Test Clause in Article VI to read, "no *other* religious test shall ever be required." (emphasis added). For a statement on the irrelevance of South Carolina's proposal, see JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 303 n.29 (2000).

science, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.<sup>100</sup>

The same text was copied by North Carolina and Rhode Island.<sup>101</sup> New York proposed:

That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.<sup>102</sup>

New Hampshire proposed the most succinct amendment: "Congress shall make no laws touching religion, or to infringe the rights of conscience."<sup>103</sup> Additionally, the minorities that lost the ratification battle in Pennsylvania and Maryland circulated proposed amendments.<sup>104</sup>

### B. *The Drafting of the Free Exercise Clause in the First Congress*

On June 8, 1789, James Madison introduced on the House floor the following three amendments related to religious free exercise:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be es-

100. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 657–61 (Jonathan Elliot ed., 2d ed. 1888), *reprinted as Virginia Ratifying Convention, Proposed Amendments to the Constitution*, in 5 THE FOUNDERS' CONSTITUTION 15, 16 (Philip B. Kurland & Ralph Lerner eds., 1987).

101. *See, e.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242–46, 248–49 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 17, 18.

102. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 327–31 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 11, 12.

103. *Id.* at 326, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 11.

104. The Pennsylvania minority suggested:

The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the Constitution of the several states, which provide for the preservation of liberty in matters of religion.

MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 79 (2d ed. 2002). The Maryland minority offered the following: "[T]hat there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty." *Id.*

established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.<sup>105</sup>

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.<sup>106</sup>

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.<sup>107</sup>

Madison did not copy any of the amendments proposed by the various states. Moreover, he proposed an amendment directed against the states, something that no state suggested or probably even contemplated.<sup>108</sup> Curiously, Madison did not propose the same language to apply against the states and the national government. For the national government he offered two separate provisions: no abridgment of civil rights on account of religion and no infringement of the “full and equal rights of conscience.” For the states he proposed only the non-violation of the “equal rights of conscience.” Juxtaposing the two proposals might suggest that Madison thought the non-abridgement of civil rights was not a part of the “equal rights of conscience.” If it were, then the text directed at the national government would have been redundant; he would not have needed to stipulate the non-abridgement of civil rights in addition to the protection of the “full and equal rights of conscience,” because the latter would have encompassed the former.

Such an inference, however, is doubtful. As I have discussed elsewhere, Madison considered the denial of civil rights on account of religion a *prima facie* violation of religious liberty.<sup>109</sup> He might not have proposed the non-abridgement of civil rights in his state amendment because doing so would surely have doomed it. At the time, several states abridged civil rights on ac-

105. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

106. *Id.*

107. *Id.* at 452.

108. Most Anti-Federalists were concerned about potential encroachments on individual rights by the new national government and, accordingly, did not seek amendments to the Constitution to protect individuals from state governments. See also HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 68–69 (1981); McConnell, *supra* note 2, at 1484 n.381.

109. Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 27 (2003).

count of religion, including the right to hold office.<sup>110</sup> Proposing an amendment to apply against the states was audacious in itself; an amendment that would have made a widespread state practice immediately unconstitutional probably would not have had any chance of being ratified. Why Madison proposed the non-abridgement of civil rights on account of religion in addition to the protection of the "full and equal rights of conscience" in his federal amendment is a bit of a mystery. Regardless, the point quickly became moot as a House committee immediately eliminated the civil rights non-abridgement provision.<sup>111</sup>

Madison's proposed amendments were sent to a committee consisting of one representative from each of the eleven states represented in the First Congress. The committee, on which Madison himself sat, made the following changes to Madison's original drafts:

The civil rights of none shall be abridged on account of religious belief or worship, ~~nor no shall any national~~ religion shall be established *by law*, nor shall the full and equal rights of conscience be ~~in any manner, or on any pretext~~, infringed.<sup>112</sup>

[N]o State shall *infringe* ~~violate~~ the equal rights of conscience . . . .<sup>113</sup>

No records of the committee's proceedings exist, so one can only speculate about why the committee made the revisions it did. As mentioned, the committee eliminated the non-abridgement-of-civil-rights provision, perhaps because it

110. According to John K. Wilson, the following state constitutions included religiously-based limitations on holding public office: Delaware (1776), Maryland (1776), New Jersey (1776), North Carolina (1776), Pennsylvania (1776), Georgia (1777), South Carolina (1778), Massachusetts (1780), and New Hampshire (1784). Vermont, which became a state in 1791, also adopted a constitution (1777) with religious limitations on holding office. John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & ST. 753, 764 (1990).

111. Judge McConnell interprets "full and equal rights of conscience" to imply that "the liberty of conscience is entitled not only to equal protection, but also to some absolute measure of protection apart from mere governmental neutrality" — that is, exemptions. McConnell, *supra* note 2, at 1481. If Judge McConnell is correct, then the subsequent elimination of "full" by the First Congress could also be interpreted to imply the elimination of exemptions, an extrapolation that he resists. *Id.* at 1482. Judge McConnell's attempt to draw a meaningful implication from the initial inclusion of the word "full," and then his denial that the word's subsequent exclusion has a meaningful implication, seem to be a stretch. Little can be drawn from the word's original inclusion or its subsequent elimination.

112. 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1834).

113. *Id.* at 783.

thought the clause redundant. The committee also eliminated the seemingly unnecessary words “full and” before the “equal rights of conscience” in the amendment directed toward the national government, and replaced “violate” with “infringe” in the state amendment, making the language of the national and state amendments parallel to each another.

On August 15, 1789, the full House considered the amended text:

[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.<sup>114</sup>

The debate that ensued concentrated on the text relating to what would become the Establishment Clause;<sup>115</sup> nothing of substance was said about what would become the Free Exercise Clause. The House made the following changes:

*Congress shall make no laws touching no religion, or infringing shall be established by law, nor shall the equal rights of conscience be infringed.*<sup>116</sup>

Two days later, on August 17, the House considered the amendment directed at the states. Thomas Tudor Tucker of South Carolina objected on the grounds that “[i]t will be much better . . . to leave the State Governments to themselves, and not to interfere with them more than we already do.”<sup>117</sup> Madison responded that he conceived the state amendment to be

the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.<sup>118</sup>

114. *Id.* at 757.

115. For an account of the House proceeding regarding the Establishment Clause, see Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 623–31 (2006).

116. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1834).

117. *Id.* at 783.

118. *Id.* at 784. That Madison proposed protection for the “right of conscience” against state governments is further evidence against Steven D. Smith’s position that the original meaning of the Free Exercise Clause pertains to federalism. Madison’s proposal, which the House voted to adopt, only makes sense if the “right of conscience” belongs to individuals and, accordingly, could be protected against state encroachment. Cf. SMITH, *supra* note 98, at 35–43.

Samuel Livermore of New Hampshire suggested making the amendment an "affirmative proposition,"<sup>119</sup> to which the House agreed, and which resulted in the following changes:

~~No State shall infringe~~ the equal rights of conscience, ~~nor~~ the freedom of speech, or of the press, ~~nor of~~ and the right of trial by jury in criminal cases, *shall not be infringed by any State.*<sup>120</sup>

In the final wording of the amendments that was sent to the Senate, the transposition was not made. No reason for the mistake is recorded.

On August 20, Fisher Ames of Massachusetts proposed and the House accepted the following revisions to the amendment directed at the national government:

Congress shall make no laws *establishing touching* religion, or to *prevent the free exercise thereof*, ~~infringing~~ or to *infringe* the rights of conscience.<sup>121</sup>

The reasons for the inclusion of "free exercise" in addition to "rights of conscience" is not clear, as no discussion of the matter is recorded in the House records. Immediately after the adoption of "free exercise," debate ensued over the proposed religious exemption from military service included with what would become the Second Amendment. No evidence exists to suggest that any delegate connected an argument for or against exemptions to the just-adopted language of "free exercise," which suggests that "free exercise" was not understood to grant religious individuals exemptions from generally applicable laws.<sup>122</sup>

On August 21, the House resumed consideration of amendments. In the *House of Representatives Journal*, the text of the national amendment is different than that adopted the previous day, with the following changes reflected in the record:

Congress shall make no law establishing religion, or *prohibiting to prevent* the free exercise thereof, ~~or to infringe~~ *nor shall* the rights of ~~C~~conscience *be infringed.*<sup>123</sup>

119. 1 ANNALS OF CONG. 784 (Joseph Gales ed., 1834).

120. *Id.*

121. *Id.* at 796.

122. *See infra* Part III.

123. H.R. JOURNAL (Aug. 21, 1789), reprinted in 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 159 (Linda Grant De Pauw ed., 1972).

The reasons for the changes, including the change from “to prevent” to “prohibiting,” are unclear. Possibilities include an unrecorded amendment or mistranscriptions in either the *Annals* or the final copy of the engrossed bill.<sup>124</sup>

On August 24, the House sent the following version to the Senate:

Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.<sup>125</sup>

No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.<sup>126</sup>

On September 3, 1789, the Senate took up what would become the First Amendment. The Senate considered and defeated the following three motions to amend the House’s language:

Congress shall make no law establishing *one religious sect or society in preference to others* ~~religion, or prohibiting the free exercise thereof;~~ nor shall the rights of conscience be infringed.<sup>127</sup>

Congress shall *not make any law, infringing* ~~make no law establishing religion, or prohibiting the free exercise thereof;~~ ~~nor shall~~ the rights of conscience be ~~infringed,~~ or *establishing any religious sect or society.*<sup>128</sup>

Congress shall make no law establishing *any particular denomination of religion in preference to another,* or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.<sup>129</sup>

The Senate then adopted the following change:

Congress shall make no law establishing religion or prohibiting the free exercise thereof, ~~nor shall the rights of Conscience be infringed.~~<sup>130</sup>

124. McConnell, *supra* note 2, at 1483.

125. S. JOURNAL, 1st Cong., 1st Sess., at 63 (Aug. 25, 1789) *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 136. On August 25, the Senate read the August 24 House resolution proposing articles of amendment to the Constitution.

126. *Id.* at 64 (Aug. 25, 1789).

127. *Id.* at 70 (Sept. 3, 1789).

128. *Id.*

129. *Id.*

130. *Id.*

Three of the four motions considered on September 3, including the one that was adopted, moved to eliminate either “free exercise” or “rights of conscience.” Although these motions may indicate that the Senate thought “free exercise” and “right of conscience” redundant, it is unclear why the Senate ultimately voted to keep “free exercise” and not “rights of conscience.” If a difference in meaning between the two phrases existed, it is not apparent from either the House or Senate debates. The Senate may have kept “free exercise” for no better reason than that “rights of conscience” came at the end of the amendment and thus was more convenient to remove.<sup>131</sup> No further changes to what would become the Free Exercise Clause are recorded in the Senate’s deliberations.

On September 7, the Senate eliminated the amendment directed at the states.<sup>132</sup> No reason was recorded, though given that Senators at the time were elected by state legislatures, it may be that the Senate thought it improper to adopt an amendment applied against the States.<sup>133</sup> On September 9, the Senate adopted the following text:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.<sup>134</sup>

On September 24, 1789, a joint congressional committee reconciled the differences between the House and Senate versions and crafted what would become the First Amendment: “Con-

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131. Cf. McConnell, *supra* note 2, at 1488–91. Despite repeatedly recognizing that the terms “liberty of conscience” and “free exercise of religion” were used interchangeably at the time, *id.* at 1482–83, 1488, 1495, and, therefore, that the adoption of the latter instead of the former may have been “without substantive meaning,” *id.* at 1488, Judge McConnell concludes that the adoption of “free exercise” instead of “rights of conscience” is “of utmost importance,” *id.* at 1489. Judge McConnell’s own evidence belies his conclusion. Moreover, even if Judge McConnell is right that “free exercise” protects religiously motivated conduct whereas “conscience” protects only beliefs, *id.* at 1488–89, his conclusion—that “free exercise” demands exemptions—does not necessarily follow, *id.* at 1490. “Free exercise” could be understood to protect religiously motivated actions without requiring exemptions by prohibiting, for example, state action that directly outlaws specific religious practices, such as the performance of the Catholic Mass.

132. S. JOURNAL, 1st Cong., 1st Sess., at 72 (Sept. 7, 1789) (rejecting the motion “to adopt the fourteenth article of the amendments proposed by the House of Representatives.”).

133. See McConnell, *supra* note 2, at 1484.

134. S. JOURNAL, 1st Cong., 1st Sess., at 77 (Sept. 10, 1789).

gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>135</sup>

Ultimately, regarding the original meaning of the Free Exercise Clause, almost nothing can be ascertained from its drafting in the First Congress. No member of Congress articulated what he understood by the phrases “free exercise” or “rights of conscience.” Fisher Ames and some members of the House might have thought that these two phrases denoted different types of protection, because they included both phrases in their versions of the amendment.<sup>136</sup> If so, the record does not include their explanations of what the differences were. And if such differences did exist, the Senate may have made the point moot by quickly eliminating the text “rights of conscience.” The record of the drafting of the Free Exercise Clause reads like a markup session, the focus of which was to craft text that was not redundant or stylistically awkward. Nothing suggests that the First Congress engaged in a substantive discussion of the meaning of “free exercise.”

### III. RELIGIOUS EXEMPTIONS AND THE DRAFTING OF THE SECOND AMENDMENT

Given the lack of helpful evidence from the drafting of the Free Exercise Clause, Justice O’Connor’s decision in *Boerne* to bypass the records of the First Congress would seem to be well founded. While debating what would become the Second Amendment, however, the First Congress directly addressed the question of religious exemptions from generally applicable laws. That discussion, which Justices O’Connor and Scalia passed over completely, contains evidence strongly suggesting that the First Congress did not understand the Free Exercise

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135. A slight discrepancy exists between the *Journal of the House of Representatives*, the *Senate Legislative Journal*, and the September 24, 1789, Conference Committee Report, on the one hand, and the *Annals of Congress* on the other. The first three sources report the final language of the Free Exercise Clause to be, “or prohibiting the free exercise thereof,” whereas the *Annals* reports, “or prohibiting a free exercise thereof.” See H.R. JOURNAL (Sept. 24, 1789), reprinted in 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 228; S. JOURNAL, 1st Cong., 1st Sess., at 76 (Sept. 24, 1789); H.R. JOURNAL (Sept. 24, 1789) (Conf. Rep.), reprinted in 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 123, at 47; 1 ANNALS OF CONG. 948 (Joseph Gales ed., 1834) (emphasis added).

136. As noted, Judge McConnell emphasizes the difference between texts protecting religious “conscience” and religious “free exercise.” See *supra* note 131.

Clause to include a right to religious exemptions from generally applicable laws.

In addition to denouncing the Constitution's lack of protection for religious "free exercise," Anti-Federalists also decried the absence of conscientious exemptions from military service.<sup>137</sup> The criticism was sufficiently powerful that in ratifying the Constitution, Virginia, North Carolina, and Rhode Island submitted an amendment exempting conscientious objectors from bearing arms.<sup>138</sup>

Recognition of the unique burden that military service placed on some religious believers was not unusual in the Founding period.<sup>139</sup> Delaware, Pennsylvania, New Hampshire, New York (for Quakers only), and Vermont included conscientious objection provisions in their constitutions.<sup>140</sup> The provisions were

137. STORING, *supra* note 108, at 97 n.2. The criticism was expressed with particular vigor in Pennsylvania, perhaps most colorfully by "Centinel" in response to the vesting of Congress with power to provide and call forth the militia in Article I, Section 8:

This section will subject the citizens of these States to the most arbitrary military discipline, even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent, and for any length of time, at the discretion of the future Congress . . . ; there is no exemption upon account of conscientious scruples of bearing arms; no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New-Hampshire, however incompatible with their interests or consciences;—in short, they may be made as mere machines as Prussian soldiers.

*Letters of Centinel No. 3*, PHILA. FREEMAN'S J., Nov. 14, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 154, 159–60. For other Pennsylvania Anti-Federalist criticisms, see *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 145, 164; *Essays of Philadelphensis No. 2*, PHILA. INDEP. GAZETTEER, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 106, 107; *Letter by an Officer of the Late Continental Army*, PHILA. INDEP. GAZETTEER, Nov. 6, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 91, 94. Similar objections were made by Anti-Federalists in Maryland and New York. See *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 92, 97; *Address of the Albany Antifederal Committee*, N.Y. J., Apr. 26, 1788, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 122, 123; Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 79, 86.

138. See *infra* note 142 and accompanying text.

139. For a discussion of the history of religious exemptions from military conscription in America before the Founding period, see McConnell, *supra* note 2, at 1468–71.

140. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 339 (Richard L.

not exemptions *per se*, because an equivalent payment was required in lieu of military service. Nonetheless, they reveal that it was within the Framers' legal horizon to extend special privileges to individuals on account of the conscientious demands of religion.<sup>141</sup>

Among their proposed amendments to the Federal Constitution, Virginia, North Carolina, and Rhode Island submitted to Congress the following:

That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.<sup>142</sup>

Minorities from the Pennsylvania and Maryland ratifying conventions also proposed amendments related to conscientious objection from military service.<sup>143</sup>

Perry ed., 1959) (Delaware); *id.* at 330 (Pennsylvania); *id.* at 383 (New Hampshire); *id.* at 365 (Vermont). New York's constitution of 1777 gave exemptions only to "the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms." 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2637 (Francis Newton Thorpe ed., photo. reprint 2002) (1909).

141. The unique burden that military service placed on some religious believers was also recognized at the national level. In 1775, shortly before the outbreak of the Revolution, the Continental Congress included the following paragraph in its call for soldiers:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 51, at 187, 189.

142. 5 THE FOUNDERS' CONSTITUTION, *supra* note 100, at 16 (Virginia); *id.* at 18 (North Carolina); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 100, at 335 (Rhode Island).

143. The minority in Pennsylvania proposed:

The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion.

1 THE DEBATES ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 532 (1993). Pennsylvania's constitution at the time included a provision exempting men "conscientiously scrupulous of bearing arms" from being compelled to do so, provided they paid an equivalent in lieu of service. SOURCES OF OUR LIBERTIES, *supra* note 140, at 330. During the Pennsylvania ratification debates, those opposed to ratification of the Constitution had argued that "[t]he rights of con-

As part of his attempt to quell Anti-Federalist opposition to the Constitution, James Madison proposed the following when he submitted amendments to the First Congress on June 8, 1789:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.<sup>144</sup>

On August 17, the House debated the following amended text:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.<sup>145</sup>

The ardent Anti-Federalist Elbridge Gerry immediately took exception to the provision, reading the language as granting the national government discretionary power to “declare who are those religiously scrupulous, and prevent them from bearing arms.”<sup>146</sup>

After a brief discussion, the House brushed aside Gerry’s concern. James Jackson, a Revolutionary War hero, objected to the provision as “unjust,” because it did not specify that conscientious objectors were obligated to pay an equivalent in lieu of military service.<sup>147</sup> Madison’s original language had implicitly recognized the prerogative of the legislature to demand a payment in lieu of military service by including the words “in person,” but by August 17 “in person” had been eliminated.<sup>148</sup> William Smith of South Carolina immediately supported Jackson’s position, suggesting that the House adopt the proposed language submitted by Virginia and North Carolina, which in-

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science may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms.” 1 THE DEBATES ON THE CONSTITUTION, *supra*, at 550.

The minority in Maryland proposed the following text: “That no person, conscientiously scrupulous of bearing arms in any case, shall be compelled *personally* to serve as a soldier.” *Address of a Minority of the Maryland Ratification Convention*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 97.

144. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

145. *Id.* at 778.

146. *Id.*

147. *Id.* at 779.

148. *Id.* at 778.

cluded an equivalent payment provision.<sup>149</sup> Roger Sherman and John Vining objected. Sherman said that those religiously scrupulous of bearing arms “are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other.”<sup>150</sup> Vining is recorded as stating that “he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.”<sup>151</sup>

At this point, Egbert Benson of New York moved to eliminate the conscientious objector provision altogether. He is recorded as saying:

No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.<sup>152</sup>

Benson’s statement contained three interrelated arguments. First, he asserted that exemptions should not be a constitutional right because they are not a part of the natural right to religious liberty.<sup>153</sup> The record does not include Benson’s explanation (if he offered one) about why he thought the right to religious liberty to be so limited. Whatever his reasoning, Benson clearly did not believe that conscientious objectors possessed a natural right to be exempt from military service. Second, be-

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149. *Id.* at 779.

150. *Id.*

151. *Id.*

152. *Id.* at 780.

153. For a general discussion of the meaning of “natural rights” at the time of the Founding, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993). For a general discussion of what the Founders meant by the natural right of religious liberty, see Hamburger, *More Is Less*, *supra* note 6. Although he does not discuss Benson in particular, Hamburger’s explanation of how eighteenth-century religious dissenters understood the right of religious liberty to be unalienable and thus limited seems to capture Benson’s position. See *id.* at 839–48. For a discussion of how the Founders understood the protection of natural rights to be compatible with the imposition of civil obligations, including the duty of military service, see Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 *SUP. CT. REV.* 295, 305 (1992).

cause it was not a natural right, Benson thought exemptions should remain a matter of "discretion." His comment suggests that if conscientious exemption was made into a constitutional right, the government, including the judiciary, could not address the matter in a discretionary manner—that is, rights of conscience could not be balanced against other competing governmental interests. Third, Benson feared that a constitutional right to conscientious objection would involve the judiciary "on every regulation . . . with respect to the organization of the militia."<sup>154</sup> Clearly anticipating judicial review, he seems to have feared that lawsuits filed by conscientious objectors would lead to improper judicial oversight over the organization of the militia. Benson did acknowledge that the government could "indulge" conscientious objectors. But if such a privilege were to be extended, the matter properly belonged to the legislature. He appears not to have feared the insufficiency of discretionary legislative exemptions, remarking that "the legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of."<sup>155</sup>

Benson's comments appear to have had some support within the House, although not a majority. Immediately after his statement, a motion was made to strike the exemption clause, but it failed by a vote of 22 to 24.<sup>156</sup> Three days later, the House again debated the provision. This time, Thomas Scott of Pennsylvania raised objections. He repeated Benson's criticism that the matter was "a legislative right altogether," and he added a different objection, that if religious objectors could neither be called to service nor be made to pay an equivalent, "a militia can never be depended upon."<sup>157</sup> Recourse then would need to be made to a standing army,<sup>158</sup> an institution that some at the time thought was inimical to liberty.<sup>159</sup> Scott seemed to be par-

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154. 1 ANNALS OF CONG. 780 (Joseph Gales ed., 1834).

155. *Id.* Benson's explicit distinction between legislatively-granted exemptions and judicially-granted exemptions casts significant doubt on Judge McConnell's assumption that "[i]f legislatures conceived of exemptions as an appropriate response to conflicts between law and conscience, there is every reason to suppose that the framers and ratifiers of the federal Constitution would expect judicially enforceable constitutional protections for religious conscience to be interpreted in much the same manner." McConnell, *supra* note 5, at 1119.

156. 1 ANNALS OF CONG. 780 (Joseph Gales ed., 1834).

157. *Id.* at 796.

158. *Id.*

159. See STORING, *supra* note 95, at 84, 17 n.12.

ticularly vexed by the problem of draft-time conversions. With uncompensated exemptions available, "the generality of persons will have recourse to these pretexts to get excused from bearing arms."<sup>160</sup> Scott said he did not mean to deprive those who were religiously scrupulous from "any indulgence the law affords," but "to guard against those who are of no religion."<sup>161</sup>

Representative Elias Boudinot of New Jersey is the only person recorded as responding to Scott. A Presbyterian and, later, president of the American Bible Society, Boudinot said he hoped "that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person."<sup>162</sup> "[B]y striking out the clause," he continued, "people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms."<sup>163</sup> Responding directly to Scott's concerns about the militia's dependability, Boudinot asked rhetorically, "Can any dependence . . . be placed in men who are conscientious in this respect?"<sup>164</sup> Moreover, he asked, "[W]hat justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?"<sup>165</sup> This latter point suggests that Boudinot thought that exemptions were not only prudent (given that conscientious objectors would likely make bad soldiers), but also necessary to meet the just demands of religious freedom. After Boudinot's comments, the record includes the following: "Some further desultory conversation arose, and it was agreed to insert the words 'in person' to the end of the clause; after which, it was adopted."<sup>166</sup>

The restoration of Madison's original "in person" is significant. The language, "but no person religiously scrupulous shall be compelled to bear arms in person" suggests that the House viewed exemptions from military service more as a privilege than a right. As Sherman and Vining recognized in the House debate on August 17, many of those who opposed bearing arms were equally scrupulous of getting substitutes or paying an

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160. 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1834).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

equivalent.<sup>167</sup> If religious individuals were understood to possess a right not to serve in the military on account of conscientious objection, then for the same reason they also would seem to possess an equal right not to pay for an equivalent. The reinsertion of "in person" suggests that the House understood conscientious objection not to override a citizen's civil obligations. Stated differently, "in person" indicates that the House thought the state legitimately could demand some actions that burdened religious individuals' consciences. By restoring the words "in person," the House rejected Boudinot's hope that they "show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person."<sup>168</sup>

Even more significantly, on September 9, 1789, the Senate eliminated the conscientious objector provision altogether.<sup>169</sup> Unfortunately, there is no record of the Senate's deliberations on this point. Regardless, the Senate's elimination of the conscientious objector provision would seem to undermine Judge McConnell's assertion that "[t]he significance of Boudinot's position . . . is that he, with a majority of the House, considered exemption from a generally applicable legal duty to be 'necessary' to protect religious freedom."<sup>170</sup> Congress as a whole *rejected* Boudinot's position. The real significance of Boudinot's position, then, would seem to be that it indicates that the First

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167. According to Ellis West:

[T]he [military service] exemptions granted to conscientious objectors [in early America] were seldom, if ever, considered by them to be adequate or satisfactory because they were limited or conditional in nature. To avoid military service, the objectors had to secure a substitute or pay a fine or special tax. It is quite clear, moreover, that the lawmakers who imposed the fines or taxes considered them to be the equivalent to military service, and their amount was set accordingly. As a result, the exemptions were rejected by most Mennonites, Brethren, and Quakers, some of whom suffered imprisonment and loss of property for failure to serve, pay a fine/tax, or secure a substitute. Moreover, the lawmakers in the various states were quite aware that pacifists objected to paying a fine or tax in lieu of military service.

West, *The Right to Exemptions*, *supra* note 6, at 381 (footnotes omitted). Material cited by West includes: PETER BROCK, *PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* 199-200 (1968); RICHARD K. MACMASTER ET AL., *CONSCIENCE IN CRISIS: MENNONITES AND OTHER PEACE CHURCHES IN AMERICA, 1739-1789*, at 62-63 (1979); RICHARD K. MACMASTER, *LAND, PIETY, PEOPLEHOOD* 256-57 (1985); R. R. RUSSELL, *Development of Conscientious Objector Recognition in the United States*, 20 *GEO. WASH. L. REV.* 409, 414 (1952).

168. 1 *ANNALS OF CONG.* 796 (Joseph Gales ed., 1834).

169. *S. JOURNAL*, 1st Cong., 1st Sess. 77 (Sept. 9, 1789).

170. McConnell, *supra* note 2, at 1501.

Congress *did not* consider exemption from a generally applicable legal duty to be necessary to protect religious freedom.

The following points can be taken from Congress's debates over the right to conscientious objection from military service. Several members of the First Congress understood the matter to be one of principle. A few articulated the opinion that the right of religious freedom itself demanded a constitutionally-recognized provision for exemptions from military service. Other House members rejected that argument, asserting instead that the matter was not one of natural or constitutional right, but only of legislative discretion. Congressman Egbert Benson spoke against conscientious exemptions, in part because they would necessarily lead to judicial review of legislative and executive actions. A majority in the House voted to allow conscientious objectors to abstain from military service in person, but they did not recognize a more general right to be exempt from civic obligations on account of their incompatibility with an individual's religious beliefs. Congress as a whole considered and rejected a constitutional right to exemption based on religion.

Most importantly and most tellingly, no evidence suggests that any member of the House connected the debate over conscientious objectors to the debate over the text that would become the Free Exercise Clause. On August 20, immediately preceding the Scott-Boudinot exchange discussed above, the House adopted the following text:

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.<sup>171</sup>

No evidence exists to indicate that Boudinot, whom Judge McConnell calls the "most eloquent defender" of the right to conscientious objection,<sup>172</sup> ever suggested that this "free exercise" text protected conscientious objectors. That the House continued to debate a conscientious objector provision *after* it had adopted language protecting "free exercise" suggests that it did not consider "free exercise" to include the right to judicially granted exemptions from generally applicable laws. If it had, then the later debate over a conscientious objection provision would have been

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171. 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1834).

172. McConnell, *supra* note 2, at 1500.

entirely superfluous.<sup>173</sup> The concurrent but separate discussions in the House over religious exemptions from military service on the one hand, and a right to religious free exercise on the other, suggest that the House did not understand religious free exercise to include exemptions from generally applicable laws.

That the right to "free exercise" did not include the right to judicially-granted exemptions from generally applicable laws is also suggested by the Anti-Federalists' demand that a right to conscientious objection be recognized *in addition to* a right to religious free exercise. The states whose majorities proposed a conscientious objector amendment (Virginia, North Carolina, and Rhode Island) also proposed an amendment recognizing that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience."<sup>174</sup> If these states thought that this language granted religious exemptions from burdensome laws, then they would not have needed to propose an additional conscientious objector amendment.<sup>175</sup>

The state constitutions that included explicit conscientious objector provisions reflect this same point. As discussed above, the constitutions of Delaware, Pennsylvania, Vermont, New Hampshire, and New York (for Quakers only) included such provisions.<sup>176</sup> Yet the constitutions of Delaware, Pennsylvania, Vermont, and New York also explicitly protected the "free exercise" of religion, and New Hampshire's 1784 Constitution protected the "rights of conscience."<sup>177</sup> For example, Article II of the Declaration of Rights of Pennsylvania's Constitution of 1776 stated:

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173. *But see id.* at 1501 (attempting to explain why conscientious objectors "were not protected under the free exercise clause without need for a separate provision"). For a response to Judge McConnell's arguments on this point, see West, *The Right to Exemptions*, *supra* note 6, at 398-400.

174. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 101, at 18.

175. The minority in Maryland, similarly, proposed both an exemption from bearing arms for those "conscientiously scrupulous" of doing so and also a separate amendment that stated "all persons be equally entitled to protection in their religious liberty." *Address of a Minority of the Maryland Ratifying Convention*, MD. GAZETTE, May 6, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 95, at 97.

176. SOURCES OF OUR LIBERTIES, *supra* note 140, at 330 (Pennsylvania), 339 (Delaware), 365 (Vermont), 383 (New Hampshire); THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 140, at 2637 (New York).

177. SOURCES OF OUR LIBERTIES, *supra* note 140, at 329 (Pennsylvania), 338 (Delaware), 365 (Vermont), 382 (New Hampshire); THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 140, at 2637 (New York).

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . . And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.<sup>178</sup>

Article VIII of the same document stated:

Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.<sup>179</sup>

If the right of religious “free exercise” was understood to include exemptions from generally applicable but religiously burdensome laws, there would have been no need for an additional constitutional provision to safeguard conscientious objectors. The debates in the First Congress mirror the general understanding that is reflected in the state constitutions of the time: the right of religious “free exercise” was something separate from and did not include the right to exemptions from generally applicable laws.

#### CONCLUSION

On the current Supreme Court, Justices Stevens and Kennedy previously have signaled their agreement with Justice Scalia’s non-exemption interpretation of the Free Exercise Clause.<sup>180</sup> Justice Souter’s and Justice Breyer’s previous opinions suggest that they favor Justice O’Connor’s exemption interpretation.<sup>181</sup> Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito have not announced a clear position on the issue. Given that Chief Justice Roberts and Justices Thomas and Alito tend to be receptive to originalist arguments, the future of First Amendment free exercise jurisprudence may be determined by the Court’s use of history. If originalism is to guide free exercise

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178. 5 THE FOUNDERS’ CONSTITUTION, *supra* note 100, at 71.

179. *Id.* at 72.

180. Both Justice Stevens and Justice Kennedy joined Justice Scalia’s majority opinion in *Employment Div. v. Smith*, 494 U.S. 872, 873 (1990).

181. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

jurisprudence, all the available evidence from the First Congress ought to be considered.

This Article has argued that the First Congress's consideration of a conscientious objector provision in the context of the drafting of the Second Amendment reveals that its members did not understand religious exemptions to be included in the First Amendment's Free Exercise Clause. Those who advocated for the inclusion of religious exemptions in the Second Amendment never suggested that the First Amendment's right to religious free exercise included exemptions. Congress as a whole, moreover, rejected religious exemptions for what became the Second Amendment. The presence of "free exercise" protections, combined with the recognition of religious exemptions from militia service in the state constitutions of the time, further supports the conclusion that the right to religious free exercise was not understood to include exemptions. Both provisions would have been unnecessary if the former was understood to include the latter.

Thus, the evidence available from the First Congress suggests that Justice Scalia's conclusion in *Smith* and *Boerne*—that the Free Exercise Clause does not include a right to religious exemptions—is the interpretation most consonant with the original meaning of the Free Exercise Clause as it was understood by the First Congress.

## ESSAY

### THINKING ABOUT ORIGINALISM

CHARLES R. KESLER\*

If the Federalist Society is associated with a single word, it is “originalism.” Although well-known for its noble efforts to encourage freedom of thought and debate in law schools (and among lawyers), the Society’s own thoughts and debates have revolved primarily around originalism; and the Society is probably best known for its members’ embrace, propagation, and defense of that concept.

In a Federalist Society symposium, Chief Judge Frank Easterbrook once proposed that the opponents of originalism be called “inventionists.”<sup>1</sup> The neologism did not catch on, alas. But didn’t “originalism” itself have to be invented? It is not a term used by the framers and ratifiers of the United States Constitution, for example, though they knew of course its source words (origin, original, and so on). Those words denote two rather different things: an “original” is closest to the origin (the words were once synonyms), the first of its kind, the oldest example (and thus distinguished from later copies); but to be “original” is also to be new, pathbreaking, creative (and thus not a copy of anything previous). An original can be old or new. As the doctrine defended today by the Federalist Society and by American conservatives in general, originalism is a new term for fidelity to something old, namely, the Constitution.

But liberals and other critics of such originalism will object that that old Constitution was once new; indeed, that it was once the culmination or the terminal moment of a political

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1. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 59 (1988); Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 HARV. J.L. & PUB. POL’Y 901, 901 (2008).

revolution. They will point out that imitation is the sincerest form of flattery, and that true “originalism” should therefore include approaching the interpretation of the Constitution in a bold, new, creative spirit, even as its framers had approached the Articles of Confederation.<sup>2</sup> In effect, fidelity to the Constitution, properly understood, should mean making it new, surpassing it, leaving it gradually behind in pursuit of more timely and progressive modes of government and administration.

Franklin D. Roosevelt and other liberal political leaders used to talk like that, and appeals to the American founders’ pragmatic, forward-looking spirit still echo occasionally in our politics and even in the academy. But such sentiments are rarer than they used to be for the simple reason that modern liberals’ opinion of the Constitution and its framers is lower, or at any rate more crudely expressed, than it used to be.<sup>3</sup> Exponents of the progressive or evolutionary Constitution used to emphasize its continuity with the past; evolution, after all, is supposed to connect the best of the past with the present. Today, by contrast, it is common to hear, especially from political figures who do not have to stand for election, that the Constitution comes from “a world that is dead and gone.”<sup>4</sup> They mean that the Constitution would be dead and gone, or at least irrelevant, like the eighteenth-century world from which it sprang, had it not been infused with new meaning(s) vouchsafed by subsequent, more enlightened ages.

Since its proximate origins in the Progressive Movement early in the twentieth century, American liberalism has taken a jaundiced view of the Constitution. The most famous of the so-called Progressive historians—especially Charles Beard, Vernon Parrington, and J. Allen Smith—regarded the American Revolution as a nascent social revolution, the beginnings of an egalitarian democratic order that would liberate, and empower, the inter-

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2. See Charles R. Kesler, *Ratification Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 298–301 (Edwin Meese III et al. eds., 2005); Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 *S. CAL. INTERDISC. L.J.* 549 (1995).

3. For a modern pragmatist’s account of the shift from what he calls “reform liberalism” to “cultural liberalism,” see RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1999).

4. William J. Brennan, Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 55–70 (Steven G. Calabresi ed., 2007).

ests of the vast majority of Americans who were farmers, artisans, and laborers. According to the historians, this powerful impulse towards social democracy arose not so much from the theory of the Revolution as contained, say, in the Declaration of Independence and the colonists' earlier protests against the British parliament, but mainly from the deeds or actions of revolution itself. As the majority discovered its power in street demonstrations and legislative halls, it discovered itself as a social force capable of standing against domestic as well as foreign elites. The innermost character of the Revolution revealed itself, therefore, in anti-Loyalist mobs, the seizure of Tory property, and the new state constitutions with their casting off of monarchy and aristocracy and their proud adoption of annual elections, populist legislatures, and weak courts and governors. Shay's Rebellion (1786–87) was, in this view, not a threat to but a reaffirmation of the Revolution's essential spirit.<sup>5</sup>

That spirit was thwarted, however, by the Constitution. Beard and the other Progressive historians regarded the Philadelphia Convention and the resulting frame of government as a kind of counterrevolution against American democracy. Echoing and broadening the charges made by the Constitution's original opponents, the Anti-Federalists, the Progressives argued that the events of 1787 had brought the Revolution to an end by subverting it. Their overarching criticism was that the Constitution had subordinated human rights to property rights, democracy to oligarchy. The new system weakened the state governments, protected the obligations of contract against popular interference, and erected a powerful central government (crowned by a federal judiciary with good-behavior tenure) designed to limit the people's rule—and designed to be very difficult to alter or abolish. Far from being political demigods, the Framers were agents of the rich—of the bondholders, speculators, stockjobbers, bankers, and lawyers. Beard held, in fact, that the authors of *The Federalist* had explained the scheme forthrightly in *Federalist 10*: for

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5. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (The Free Press 1941) (1913); VERNON LOUIS PARRINGTON, MAIN CURRENTS OF AMERICAN THOUGHT: AN INTERPRETATION OF AMERICAN LITERATURE FROM THE BEGINNINGS TO 1920 (Univ. of Okla. Press 1987) (1927, 1927, 1930); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION (Harv. Univ. Press 1965) (1907).

the sake of private property and finance capitalism, the Constitution had to check majority faction, which meant, (according to Beard) suppressing majority rule itself.<sup>6</sup>

Not all Progressive critics were so quasi-Marxist in their indictment of the Constitution. Woodrow Wilson, for instance, attributed the document's failings to the time-bound and imaginary character of its "literary theory": the state of nature, natural rights, and the social contract were sheer fantasy, he maintained.<sup>7</sup> Although certainly historicist, his views had a different flavor from Beard's. Nonetheless, broadly speaking, these thinkers attacked the Constitution as unfair and outmoded, reserving special scorn for its least democratic features, the separation of powers and judicial review.

From the late nineteenth century to the New Deal, American progressives were bitter enemies of the Supreme Court's reigning jurisprudence. The judiciary seemed the living embodiment of the original Constitution's zeal for property rights, and in the Constitution's name the Court continued to strike down reform legislation passed by the states (for example, the New York law regulating bakers' hours of labor, invalidated in *Lochner*). It was, to the critics' eyes, a familiar story of democratic experimentation short-circuited by the least democratic branch of a not very democratic, and in some respects frankly oligarchic, national government.<sup>8</sup>

But it was the separation of powers that bore the brunt of Progressive and liberal criticism of constitutional arrangements. For the better part of a century—from Woodrow Wilson to James MacGregor Burns to Lloyd Cutler—liberals had the same complaint: that the separation of powers resulted in government deadlock or gridlock, thereby foolishly and unconscionably re-

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6. BEARD, *supra* note 5, at 152–88; SMITH, *supra* note 5, at 205–07. For a neo-Beardian analysis, see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1994).

7. See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 25–81 (Columbia Univ. Press 1917) (1908) [hereinafter WILSON, *CONSTITUTIONAL GOVERNMENT*]; WOODROW WILSON, *THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS* 1–16 (1889).

8. For a specimen of the Left's impatience with judicial review, see HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943).

tarding the nation's forward progress.<sup>9</sup> Better to have a parliamentary system, or any system that would replace checks and balances with cooperation among the branches of government, in order to get the country moving again. In his influential statement of the Progressive case, Wilson drew on Charles Darwin, noting that government must be open to easy change and mutation if it is to survive, to evolve. "Living political constitutions must be Darwinian in structure and in practice," he wrote.<sup>10</sup> Wilson invented the argument for the Living Constitution, which in his original, Social Darwinist version, was a theory of the entire government or state, not merely of the judiciary.

In the theory of the Living Constitution, liberals found a way to make peace with the Constitution of 1787, but only by turning it into the Constitution of What's Happening Now. To replace the actual frame of government with a new one proved impossible, but also unnecessary. Liberals merely had to pour a new wine into the old bottle—to introduce into the system a radically new spirit of interpretation. The old constitutional forms remained, but were bent to a new purpose: constitutional development, or the movement of the polity into the future. The Fourteenth Amendment proved a convenient vehicle for progress on the judicial front, but the national executive and legislative branches cooperated and in many instances (the New Deal, for example) took the lead.

The future that the Living Constitution steers for is nominally democratic or, more precisely, social democratic. Although the American people have not always been keen on that transformation, and have sometimes positively resisted it, their recalcitrance has not derailed the liberal project. Nonetheless, popular resistance has helped to inspire a darker, more radical version of the enterprise. Earlier critics had argued that the Constitution was un- or anti-democratic. Today's liberals, especially in the judiciary and academy, are more likely to denounce the Constitution of 1787 as racist, sexist, and homophobic. The first con-

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9. See generally WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 7, at 54–81; WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 33–54 (Doubleday, Page, & Co. 1918) (1913); JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); Lloyd N. Cutler, *To Form a Government*, FOREIGN AFF., Fall 1980, at 126–43; see also ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4–33 (1956).

10. WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 7, at 56–57.

tention implies that the people, the overwhelming majority, were virtuous but politically duped and defeated. The second implies that the people, the vast white majority, were themselves racist, sexist, and homophobic. Given this legacy of democratic tyranny, liberals do not wonder that contemporary majorities are not always enlightened. To square this brute fact with the assumption of moral and political progress, however, liberals often have to put their faith in future majorities. For example, when Justice Brennan explained his eccentric view that capital punishment is unconstitutional, he appealed for support not to the actual Constitution or to existing majorities (who were overwhelmingly in favor of the death penalty), but to a future majority that would agree with him.<sup>11</sup> Thus does Darwinian evolution become a faith in things unseen and to come, and putative democracy give way to rule by History's priests.

Defenders of the Constitution's original intent have their work cut out for them. For it is not enough to assert that judges should be bound by the original intent of the framers or ratifiers, nor that the original meaning of the Constitution's words ought to be authoritative. These contentions are exposed to familiar, though not insuperable, objections. Briefly: The text itself does not say to abide by the text itself. Those who live by positivism therefore risk dying by positivism. The text plus tradition leaves open what counts as tradition, or more precisely how one should distinguish between good and bad traditions, for surely not every precedent or line of precedent is sound, or even coherent. What is "the tradition" of equal protection law and jurisprudence, exactly?

To resolve such objections would involve recourse to principles latent in the text of the Constitution and well discussed in the pages of *The Federalist* and other early commentaries. But these principles are not positive law, even though they are presupposed by it. They belong to what *The Federalist* calls "the nature and reason of the thing."<sup>12</sup> Many originalists shun these ideas of natural justice because they seem akin to the historical velleities of today's "activist" judges, even though the Living Constitution has nothing to do with such timeless

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11. Brennan, *supra* note 4, at 68–69.

12. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter & Charles Kesler eds., 1999).

notions and the original Constitution had very much to do with them, and its makers and defenders said so copiously and carefully.<sup>13</sup>

Agile originalists often try to sidestep these issues by insisting that for judges, at least, it is enough to apply the law as it is, not as it should be, and that the former consists of the text read modestly and in light of the prevailing tradition. Judges are here to enforce the rules of the game, as stated originally and most broadly in the Constitution. The rules are fact; everything else is values, to be left to the people's whim—that is, to democracy. The rules are meant to be counter-majoritarian in important respects, but they are exceptions to democracy that the people themselves approved. As Justice Scalia and Judge Bork like to say, originalist judges are not seeking to protect any substantive or natural goals but merely to enforce the rules the people themselves have made.

As a defense of originalism, this argument leaves much to be desired. It seems to assume that judges can avoid questions such as these: What is the purpose of the game? Why do the people get to make the rules? Did they in fact make the rules? Why can't the people change the rules, not to mention the game and the players, at will? Is fairness whatever the rules and the umpires say it is, or can an umpire's rulings and even the written rules be challenged on grounds of fairness?

Yet even if a judge could consistently and conscientiously steer clear of these considerations, the larger, political case for originalism cannot be made without them. For why continue to enforce the rules of a game that has been exposed as fixed, flawed, and fraudulent from the very beginning?

And that is exactly the indictment of the Constitution that progressive liberalism has been mounting, in various guises, for more than a century. If the original Constitution was fundamentally immoral—anti-democratic, racist, sexist, homophobic, and so on—then why, liberals ask, should modern Americans want to abide by its original intent?

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13. Cf. HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 85–133 (1986); see generally HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* (1999).

To defend originalism in the political arena, and to secure the appointment and confirmation of properly originalist judges, will take presidents, legislators, and yes, even judges, who can explain the *goodness* of the U.S. Constitution. That case, in turn, will rest on their sense of the Constitution as something deeper and higher than the rules of the democratic game. Originalism had to be invented because of the far-reaching assault the Constitution has endured in the twentieth century. But to be perfected, it will have to adopt the very arguments for the Constitution's goodness and republicanism made by its framers, and later vindicated against those who scorned it as a pact with the devil.

## ESSAY

# CONSTITUTING THE CONSTITUTION: UNDERSTANDING THE AMERICAN CONSTITUTION THROUGH THE BRITISH CULTURAL CONSTITUTION

GARRETT WARD SHELDON\*

Reference is often made to the legal, philosophical, and historical progenitors of the American Constitution in ideas derived from Great Britain, such as the writings of John Locke or William Blackstone, and familiar documents like the Magna Carta or The Petition of Right of 1628. Perhaps an even more significant constitutional heritage may be found in our inheritance of the British appreciation for the customary or cultural foundations of fundamental law. This appreciation for what is often termed the “organic” constitution, beholden philosophically to Aristotle, Aquinas, and Burke, emphasizes how a society or nation is “constituted,” and the implications of that social constitution for the written or codified document. In this respect, the example of British constitutionalism may be helpful in understanding the proper approach to American constitutional interpretation.

### I. BRITAIN’S “CONSTITUTED” CONSTITUTION

Consideration of what the inhabitants of Great Britain understand to be “the British Constitution” is instructive. By “the Constitution” the British (and all traditional societies) mean how the entire nation is “constituted” or “made up.” It is an older meaning of the word, which conveys a richness that our narrower, purely documentary “Constitution” misses. In earlier American culture, people spoke of a man’s “constitution,” or overall condi-

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tion, as healthy or sound, strong or weak. Even today we sometimes speak of a horse's "constitution" as its overall health and abilities. Similarly, when the British understand their constitution in this sense, they mean the overall condition and character of the country, including its economy, households, religion, education, manners, and arts—as well as the organization of government. The state is only a formal and representative expression of the nation's "constitution." According to this organic composition of the traditional constitution, the government and laws should conform to the other aspects of a nation's constitution, both to preserve the wholesome institutions of which society is comprised and to avoid needless friction between law and private conduct—friction that ultimately leads to diminished esteem for the organs of government. In this way, when we refer to "the Constitution" in the British sense we actually mean *more*, not less, than when we use the same words to describe the written, American Constitution. It is perhaps a more complete, wiser understanding of what a constitution is.

One of the most prominent English Constitutional Law scholars in the 1800s, now largely forgotten, was Sir William Anson, the Master of All Souls College at Oxford.<sup>1</sup> In his classic nineteenth-century work, *The Law and Custom of the Constitution* (note the title, itself reflecting a traditional organic view), Anson wrote that it is "the connection and relations" of persons in a society that "form the constitution."<sup>2</sup> Therefore, Sir William insists, especially in the early stages of its development, "the action of the State . . . dare not depart from custom."<sup>3</sup> Instead, "religious observance and moral action, as well as the maintenance of order . . . are its concern."<sup>4</sup> A government neglects its primary duty when it forgoes "maintaining and enforcing its [country's] customs," and does so at its peril—especially when it uses the written Constitution and laws to *attack* those moral customs.<sup>5</sup> When, in America, this study of society and custom was separated from that of law and government and given

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1. Of the almost forty colleges that make up Oxford University, All Souls is distinguished by the fact that it has no resident students. The Fellows of All Souls may give lectures for the larger university community, but their primary service is research and scholarship. It is unknown what effect this may have had on Sir William's writings on the English Constitution.

2. SIR WILLIAM ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 3 (1886).

3. *Id.* at 4.

4. *Id.*

5. *Id.* at 6.

over to sociology, with its Marxist presuppositions, we lost a vital link to understanding the essential role that law, government, and our own Constitution play in maintaining the social customs that gave rise to our great nation in the first place.

Sir William Anson rightly noted that because the British Constitution consists of the way that nation is constituted—culturally, morally, economically, religiously, *and* politically—the country’s constitutional change is gradual and slow. Alterations in law and custom are almost always “unconscious adaptations,” and are “never . . . comprehensive”; sudden, radical change in law initiated by legislators or judges would not only violate this organic constitution, it would cause innumerable and serious problems.<sup>6</sup> Modification in the structure of law, society, or the family should be in piecemeal changes, making the traditional constitution “a somewhat rambling structure,” with bits and pieces of the past heritage, perhaps not clean and thoroughly consistent, but compatible with conservative sensibilities.<sup>7</sup> Hence, even the political aspect of the constitution (Crown, Lords, and Commons, or “the King in Parliament”) is indistinct, as it is “collected from statutes [and] . . . legal decisions,” forming a “monument . . . of political sagacity.”<sup>8</sup>

Like Edmund Burke’s values of prudence, prescription, and incremental adaptation, the traditional Constitution, in that wise Parliamentarian’s words, is “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”<sup>9</sup> It reflects, in St. Thomas Aquinas’s formulation, Divine Law and Natural Law.<sup>10</sup> It is, in an important sense, a given. As such, it should be respected. For a single government, political party, or group of Supreme Court Justices to attempt suddenly to change that organic, cultural constitution would be improper, disastrous, and potentially suicidal. For a group to attempt to *use* the written Constitution to undermine and corrupt the cultural constitution from which it sprang, would be both dishonest, as a matter of interpretation, and foolish, as a matter of policy.

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6. *Id.* at 31.

7. *Id.*

8. *Id.* at 35.

9. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 82 (Frank M. Turner ed., 2003) (1790).

10. ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-I, Q. 91, art. 2, 4.

## II. THE AMERICAN "CONSTITUTIONS"

What insight does the "uncodified" British Constitution provide for Americans?<sup>11</sup> First, it serves to clarify the often unfamiliar idea that a cultural constitution of social, religious, economic, educational, familial, and governmental traditions *exists*. It is how America is "constituted" or "made up"—the cultural features that go back hundreds of years and remain today and will remain tomorrow, because customs change very slowly, especially if they are grounded in Divine and Natural Law. Second, it reveals that the *written* (or "codified") Constitution of the United States was derived from, and properly reflects, that original, organic constitution (of many national, but primarily Northern European heritages). And third, it suggests that attempts to distort the written Constitution in order to attack the underlying foundational constitution are especially dangerous.

Whether or not such attempts are ultimately defeated by the cultural and spiritual moorings of the organic American constitution, the use (or, rather, misuse) of the formal U.S. Constitution in an attempt to destroy the essential social constitution unavoidably causes considerable confusion and difficulties. Renewed appreciation for the organic American constitution is of special importance to prevent the expansion of the "culture of death," as Pope John Paul II termed it,<sup>12</sup> caused by various distortions of the written U.S. Constitution by those seeking to undermine the cultural and moral foundations of that document.

The best description of our nation's cultural constitution remains Alexis de Tocqueville's *Democracy in America*.<sup>13</sup> Despite its age, this insightful study of the manners, morals, institutions, and social practices in the United States continues to define the essential culture of America. Those who doubt this fundamental continuity should consider the persistence of basic Christian

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11. Professor Bogdanor provides this valuable distinction between "unwritten" and "uncodified." See *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* (Vernon Bogdanor ed., 2003). The British Constitution is written as well as organic in the sense that many written aspects (historical documents, statutes, judicial decisions, and so on) are a part of it; but unlike the "written" United States Constitution, these are not confined to a single "codified" constitution. This probably aids in an appreciation of the other social aspects of the constitution. In that sense, the American Constitution is at a disadvantage, compared with its British ancestor.

12. Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 12 (Mar. 25, 1995).

13. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1835, 1840).

religiosity, which Tocqueville admirably described, in contemporary American culture.

What are some of the essential aspects of how America was and is constituted? Tocqueville saw the values of American democracy—equality and liberty, which could lead to the excesses of tyranny and anarchy—as restrained by the salubrious cultural aspects of American society: the Christian religion; aristocracy in the legal profession and among businessmen; public-spiritedness through free associations; strong traditional families; and a basic decency of manners. These cultural aspects of American society serve as the *organic* constitution, without which the abstract principles of liberty and equality in the written, *political* Constitution cannot remain functional. Those who seek to damage this essential constitution through appeal to the abstract principles of equality and liberty in the formal Constitution—by persecuting religion, undermining professional and business authority, restricting free associations, destroying or “redefining” the family and those moral and legal principles that support it, and ridiculing decency in manners—contribute to the demise of *both* constitutions in America.

Foremost in the protection of American political rights, for Tocqueville, was the existence of a healthy Christian church.<sup>14</sup> The varied denominations produced by religious freedom create a general Christian ethos in the United States, which civilizes morals and restrains the excesses of democracy.

I have not seen a country where Christianity wraps itself less in forms, practices, and [representational] figures than the United States, and presents ideas more clearly, simply, and generally to the human mind. Although Christians of America are divided into a multitude of sects, they all perceive their religion in the same light.<sup>15</sup>

The resilience of a basic (even evangelical) Christian culture in America against a hundred years of secular education, media, and liberal government confirms Tocqueville’s analysis and affirms the persistence of a social constitution.

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14. Indeed, Tocqueville refers to America’s Puritan origins as a fundamental “point of departure,” and asserts that “there is not one opinion, one habit, one law, I could say one event, that the point of departure does not explain without difficulty.” *Id.* at 29.

15. *Id.* at 423.

The aristocracies of lawyers and businessmen, the one by its education and the other by its wealth, serve for Tocqueville as parts of the American social constitution that mitigate against democratic "tyranny of the majority" and the potential anarchy of strict equality.<sup>16</sup> Indeed, Tocqueville notes that "[t]he American aristocracy is at the attorney's bar and on the judge's bench."<sup>17</sup> Lawyers, trained in the methodical workings of the law, play a valuable role in the American cultural constitution:

When the American people let themselves be intoxicated by their passions or become so self-indulgent as to be carried away by their ideas, the lawyers make them feel an almost invisible brake that moderates and arrests them. To their democratic instincts they secretly oppose their aristocratic penchants; to their love of novelty, their superstitious respect for what is old; to the immensity of their designs, their narrow views; to their scorn for rules, their taste for forms; and to their enthusiasm, their habit of proceeding slowly.<sup>18</sup>

It is in this way that a good lawyer—and a good judge—can maintain the cultural constitution by encouraging the people "not to be unfaithful to their own laws and to remain in accord with themselves."<sup>19</sup> Such restraint serves the interests of all, for attacks on *all* types of authority ultimately promote only the chaos which most harms those of low income and status, as Thomas Hobbes effectively explained.<sup>20</sup>

Freedom of private associations (for example, social clubs, churches, and benevolent societies), while allowing what strict egalitarians deride as "discrimination," promotes, for Tocqueville, voluntary public-spiritedness. Public-spiritedness, in turn, prevents the populace from relying totally on the government, and "[t]he inhabitant of the United States learns from birth that he must rely on himself to struggle against the evils and obstacles of life."<sup>21</sup>

16. *Id.* at 239–64.

17. *Id.* at 256.

18. *Id.*

19. *Id.* at 257; see also *id.* at 254 ("The lawyer belongs to the people by his interest and by his birth, and to the aristocracy by his habits and his tastes. . . . I doubt that democracy could long govern society, and I cannot believe that in our day a republic could hope to preserve its existence if the influence of lawyers in its affairs did not grow in proportion with the power of the people.").

20. See THOMAS HOBBS, *LEVIATHAN*, pt. 1, ch xiii, at 87–89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

21. TOCQUEVILLE, *supra* note 13, at 180.

Even today, when natural disasters strike in the United States and abroad, assistance from America's "private" charity greatly outpaces and overshadows help provided by public programs. The American cultural tradition of people forming associations freely, even if it works to "exclude" some others, is legitimate and socially beneficial. "I must say," Tocqueville wrote, "that I often saw Americans make great and genuine sacrifices for the public, and I remarked a hundred times that, when needed, they almost never fail to lend faithful support to one another."<sup>22</sup>

The faithful lending of support to which Tocqueville refers invariably involves the activities of private groups. Those reformers who have worked to prevent exclusivity in voluntary associations and to transfer ever more social welfare activities to the state (with its onerous bureaucratic regulations), may have inadvertently undermined this voluntary public-spiritedness of the organic American constitution, thereby damaging the cultural constitutional fabric and diminishing actual social welfare and benevolence. As Aristotle noted in his critique of Plato's communism, it is rather hard to display the virtue of generosity when one is allowed little or no money.<sup>23</sup>

Strong, healthy families also form an important part of the American social constitution, supporting the political rights and democratic elements of the written Constitution. Although lacking the strict parental authority of family life in aristocratic societies, Tocqueville found the American family more intimate, loving, and stable.

In the democratic family the father exercises hardly any power other than that which one is pleased to accord to tenderness and to the experience of an old man. His orders would perhaps be neglected; but his counsels are ordinarily full of power.<sup>24</sup>

The persistence of the "family values" issue in American political life—despite multitudinous attempts at destroying that institution through easy divorce laws, adulation of "single parent homes" and same-sex "marriages," abortion, and attacks on the traditional role of the father—attests to the fundamental nature of the family in the American cultural constitution. The failure of the state to find any substitute for the

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22. *Id.* at 488.

23. ARISTOTLE, *NICOMACHEAN ETHICS* 1099a32; *POLITICS* 1263a25–b14.

24. TOCQUEVILLE, *supra* note 13, at 561.

moral and emotional role of the family reveals the enduring value to society of that timeless institution. A country respectful of this valuable constitutional component would not only refrain from further undermining it by specious reference to the written Constitution, but would reinforce it through appropriate public laws.

Tocqueville, perhaps surprisingly to modern sensibilities, found an American culture constituted by a basic decency in manners. While not the highly formalized decorum of aristocratic society, he recognized that “[i]n democratic peoples, manners are neither so learned nor so regular; but they are often more sincere.”<sup>25</sup> The civility of manners and speech in the social constitution (primarily taught in families, churches, and schools) makes the freedoms of speech and press that are part of the written, political Constitution constructive and functional. The misuse of formal constitutional rights to defeat those underlying values and institutions—by, for example, defending obscenity, pornography, and antisocial behavior as “rights”—causes many social problems and perverts the constitutional meaning of freedom. One has only to hear contemporary university students’ slang to realize that the benevolent restraint of verbal vulgarity formerly taught by family and school has practically disappeared.

To Tocqueville’s admirable description of America’s cultural constitution, we might add those national and ethnic traits and characteristics of the groups that shaped the U.S. population during its formative years. National qualities, until “political correctness” banned them, featured in any analysis of a culture or society—for example, the propriety and standards of the English; the faith, mysticism, and humor of the Irish; the fighting spirit and frugality of the Scots; the precision and piety of the German and Dutch settlers in Early America. I realize it is not fashionable to speak of such national characteristics today, but any examination of eighteenth-century North American writings will be found replete with them, and they, therefore, formed a conspicuous element in the original cultural constitution of America. Without recognizing the rich variety of traits forming American civilization, which are represented in much of the best of our country—*independence, charity, a strong work ethic, social morality,*

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25. *Id.* at 580.

military vigor, fair mindedness—we will be less able to defend them against assault by other “values” that manifestly produce less prosperity, freedom, and happiness. The rest of the world, in its envy, admiration, and sometimes fear of the United States, attests to the esteem with which these American cultural constitutional values are widely held.

### III. CONSEQUENCES OF CONFLATING THE CONSTITUTIONS

This Essay has attempted to show that the traditional appreciation the British have for their “cultural constitution” as an amalgam of social characteristics gradually evolving through its history—moral, political, economic, religious, educational, familial, and so on—has something to teach Americans concerning our own understanding of the United States Constitution. The first lesson that Britain’s (or any traditional society’s) appreciation of this cultural constitution teaches is that such an organic social reality actually exists. It is ignored at our peril. Judges who misuse the written Constitution to undermine these values show a disgraceful disregard for the political culture that produced that venerable document, as well as disrespect for the very judicial institutions in which they work.

Public institutions should be the guardians of this cultural heritage, not its detractors and enemies. The long-term interests of individuals, business, civic organizations, and even the media, reside in understanding and preserving the best of a country’s cultural constitution. The ultimate grounding of the American “constitutions” is 3,000 years of Judeo-Christian tradition. St. Thomas Aquinas wrote that Human Law made in variance with Natural and Divine Law would ultimately fail.<sup>26</sup> If American legislators and jurists make decisions without reference to the cultural constitution, they, too, will fail.

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26. AQUINAS, *supra* note 10, at Q. 95, art. 2.



## NOTE

# POLITICS, CONSTITUTIONAL INTERPRETATION, AND MEDIA ECOLOGY: AN ARGUMENT AGAINST JUDICIAL MINIMALISM\*

### INTRODUCTION

There is a venerable tradition of judicial humility in American constitutional law. The modern conception of judicial restraint<sup>1</sup> can be traced back to an article written by Professor James Bradley Thayer in 1893.<sup>2</sup> Thayer's argument that the Court should give all possible deference to Congress's interpretation of the Constitution<sup>3</sup> influenced Justice Holmes, who employed it in his battle against economic due process doctrine and the perceived excesses of a conservative Court.<sup>4</sup> But it was Justice Holmes's friend and colleague Justice Brandeis who distilled minimalism to a specific set of doctrines in his 1936 concurrence in *Ashwander v. Tennessee Valley Authority*.<sup>5</sup>

In 1962, Professor Alexander Bickel picked up and expanded the argument for restraint. He added the term "passive virtues" to the vocabulary of judicial restraint,<sup>6</sup> building on Justice Brandeis's 1936 opinion.<sup>7</sup> According to Professor Bickel, judicial restraint is necessary because of the tenuous legitimacy of

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\* This Note was inspired in part by remarks of Professor John Baker at an event sponsored by the Federalist Society in Little Rock, Arkansas. See John S. Baker, Jr., Professor, La. State Univ. Law Ctr., *Who's the Commander-in-Chief: Is Congress Going Too Far By Setting a Deadline for U.S. Troops To Leave Iraq?* (Apr. 10, 2007), available at [http://www.fed-soc.org/publications/pubID.296/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.296/pub_detail.asp).

1. Though mindful of possible differences, I use the terms "humility," "restraint," and "minimalism" interchangeably throughout this Note.

2. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 451 (1994). The article was James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

3. See Thayer, *supra* note 2, at 144.

4. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

5. See *Ashwander v. TVA.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

6. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111 (Yale Univ. Press 1986) (1962).

7. See *id.* at 119–22.

judicial review in a democratic system. The unelected, insulated nature of our courts means that “it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government.”<sup>8</sup>

Modern judicial minimalism has found a new home in conservative constitutional theory. The specter of substantive due process has been reborn,<sup>9</sup> and like Justices Holmes and Brandeis a century earlier, conservative legal scholars have found in the doctrine of restraint an effective weapon against judicial excess—excess spawned, this time, from the Left.<sup>10</sup> Indeed, the new Chief Justice, widely identified as a conservative, has spoken in favor of restraint,<sup>11</sup> making an exploration of the doctrine a timely enterprise. This Note attempts such an exploration from a broadly originalist vantage point, assuming for present purposes that the Framers’ understanding of the Constitution is relevant to our own understanding of that document.

Parts I and II examine the doctrine of judicial minimalism in light of a familiar approach to original understanding: Would the Framers have been comfortable with Chief Justice Roberts’s assertion that “[i]f it is not necessary to decide more to dispose of a case . . . it is necessary not to decide more”;<sup>12</sup> or would they have opposed such a notion? Part III introduces the academic discipline of media ecology, the study of how changes in media technology affect institutions. Media ecology asks questions such as, “how do television and the Internet affect the type of political discourse that Americans engage in?” This line of inquiry reveals ways in which the modern media environment has affected the institutional strengths of the political framework envisioned by the Framers. Finally, Part IV contends that the advocates of judicial minimalism are mistaken both about the Framers’ vision and the ways in which our political institutions have developed.

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8. *Id.* at 200.

9. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

10. *See id.* at 174 (Rehnquist, J., dissenting).

11. Cass R. Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11, available at <http://www.law.uchicago.edu/sunstein-minimalism-roberts.html>.

12. *Id.*

## I. THE FRAMERS AND CONSTITUTIONAL INTERPRETATION

A. *The Constitutional Conversation*

Some proponents of judicial minimalism describe the Court's role in constitutional interpretation in terms of "dialogue."<sup>13</sup> Indeed, Bickel idealized judicial review as a "colloquy with the other institutions of government."<sup>14</sup> Referring to constitutional interpretation as a colloquy rather than a monologue highlights an important aspect of judicial minimalism: by taking a more subdued role in interpreting the constitutional text, the Court invites the other two branches of government to engage more actively in the enterprise.<sup>15</sup>

Although the Framers may not have couched their vision in terms of dialogue, they would have been comfortable with the idea that the two political branches had a role to play in constitutional interpretation. The records of the 1787 Convention show that the Framers hoped the President would play a role in interpreting the Constitution. In the early days of the Convention, the delegates from Virginia set forth their proposal for what the new government should look like.<sup>16</sup> The eighth article of this Virginia Plan proposed "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate."<sup>17</sup>

Less than a month later, the Virginia Plan's Council of Revision ran into trouble. Several delegates seemed to worry that combining the executive and the judiciary in this way improperly mixed the two powers.<sup>18</sup> The objections carried the debate.<sup>19</sup> But scarcely a month later, delegates again proposed combining the judiciary with the executive in a revisionary

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13. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-80 (1993).

14. BICKEL, *supra* note 6, at 70-71.

15. See, e.g., Friedman, *supra* note 13, at 653-58.

16. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23 (Max Farrand ed., 1911) [hereinafter FARRAND]. The Virginia Plan was proposed on the floor by Edmund Randolph, *id.*, but James Madison was its main architect, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 472 (1969).

17. 1 FARRAND, *supra* note 16, at 21.

18. *Id.* at 97-98.

19. *Id.* at 98-105.

council, and Madison spoke vigorously in its favor.<sup>20</sup> The separation of powers objection was raised once again: if the judiciary was to have the power to declare laws unconstitutional, it would be improper for them to "be influenced by the part they had taken, in framing the laws."<sup>21</sup> The objections proved insuperable, and the proposal failed for the final time.

By rejecting the Council of Revision, however, the Convention was by no means denying the executive a role in constitutional interpretation. Instead, the Convention determined that this role would be embodied in the veto power. On the same day that the delegates first decided against the Council of Revision, they agreed to place the power to veto the laws of the legislature solely in the hands of the executive.<sup>22</sup> The only debate over the veto power was whether it was to be absolute or qualified. With the memory of an abusive monarch fresh in their minds, the Convention would agree only to the negative power if it could be overruled by two-thirds of the legislature.<sup>23</sup> The Framers thus invited the President to participate in the constitutional conversation, but assured that his voice would not drown out all others.

One of the motivations behind the veto power was clearly to give the President a role in constitutional interpretation. Writing in 1788, Alexander Hamilton expected that the President would use his veto power both to protect himself from legislative encroachments and to curb "the enactment of improper laws."<sup>24</sup> In his *Commentaries*, written four decades later, Joseph Story echoed Hamilton's dual justification for the veto power: not only was there a "constitutional necessity of arming [the Executive] with powers for its own defence," but such a power would be "important, as an additional security against the enactment of . . . improper laws."<sup>25</sup> Thus the veto power was intended to protect the Constitution in two ways: (1) by giving the President the ability to defend his office and protect the separation of powers, and (2) by causing the legislative enactments to pass under another pair of eyes, providing a check against unconstitutional laws.

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20. 2 FARRAND, *supra* note 16, at 73–80.

21. *Id.* at 75.

22. 1 FARRAND, *supra* note 16, at 104.

23. *Id.* at 98–104.

24. THE FEDERALIST NO. 73, at 470 (Alexander Hamilton) (Modern Library ed. 2000).

25. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 320 (Carolina Acad. Press 1987) (1833).

The legislative branch was also intended to have a role in the enterprise of constitutional interpretation. Both houses of Congress would implicitly engage in interpretation of the constitutional text as they authored and passed legislation,<sup>26</sup> but the Framers looked especially to the Senate to “seasonably interpose [against] impetuous counsels”<sup>27</sup> and to provide an “additional impediment . . . against improper acts of legislation.”<sup>28</sup> The point is illustrated by an oft-quoted anecdote. Upon returning from France, Thomas Jefferson is said to have asked George Washington, at the breakfast table, why he agreed to a second legislative chamber. “Why,” Washington replied, “did you pour that coffee into your saucer?” “To cool it,” said Jefferson. “Even so,” Washington returned, “we pour legislation into the senatorial saucer to cool it.”<sup>29</sup>

Indeed, Professor Vikram Amar has argued that providing a check against unconstitutional legislation was “a primary reason the Senate was created.”<sup>30</sup> Professor Amar notes that the Senate has an important role in “four constitutional processes: legislation, impeachment, appointment, and amendment.”<sup>31</sup> Each one of these processes requires the Senate to interpret the constitutional text. The Senate, House, President, and Judiciary all have to agree on the constitutionality of each law before it is effectively applied, and the Senate and the House interpret the “high crimes and misdemeanors” Clause<sup>32</sup> when considering impeachment and jointly engage in “constitutional interpretation of a sort” when considering amendments.<sup>33</sup> Finally, when considering appointments, each Senator, along with the President, “must not only consider his own substantive visions of constitutional provisions, he must also consider and compare those of the nominees.”<sup>34</sup> From this analysis, Professor Amar argues, “an interesting pattern begins to appear. The federal judiciary interprets the Constitution in only one, the President

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26. See Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217 (1986); see also Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986).

27. 1 FARRAND, *supra* note 16, at 422.

28. THE FEDERALIST NO. 62, *supra* note 24, at 396 (James Madison).

29. 3 FARRAND, *supra* note 16, at 359.

30. Vikram D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1116 (1988).

31. *Id.* at 1112–13.

32. U.S. CONST. art. II, § 4.

33. Amar, *supra* note 30, at 1112–13.

34. *Id.* at 1119.

in two, the House in three, and the Senate in all four of these constitutional processes."<sup>35</sup>

As we have seen, the Framers never considered the judiciary to be the sole interpreter of the Constitution. They intended both the President and the Senate to play significant roles. Although advocates of judicial minimalism are right to recognize the importance of non-judicial actors, close examination reveals that judicial minimalists are right for all the wrong reasons.

### B. *The Majoritarian Difficulty?*

"The root difficulty," according to Professor Bickel, "is that judicial review is a counter-majoritarian force in our system."<sup>36</sup> The hard reality, said Bickel, is "that when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."<sup>37</sup> Bickel assigned a more humble role to the judiciary because of its lack of democratic legitimacy, and urged deference to the constitutional judgment of the other branches when possible because he saw them as more representative of the majority's will. This argument is fundamental to minimalism because it points out what minimalists believe to be the judiciary's most fundamental weakness. As an original matter, however, this argument gets it exactly backwards. The Framers assigned the role of constitutional interpretation to the judiciary, President, and Senate not because of their democratic pedigree, but because of their insulation.

It is important to remember that the presidency originally was far from a majoritarian institution. The selection of the President, wrote Robert Dahl, "was to be insulated from both popular majorities and congressional control."<sup>38</sup> The complicated system of electors which emerged out of the Constitutional Convention reflected a fear that "[t]he people are uninformed, and would be misled by a few designing men."<sup>39</sup> Popular election of the President would invite only "tumult and disorder."<sup>40</sup>

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35. *Id.* at 1113.

36. BICKEL, *supra* note 6, at 16.

37. *Id.* at 16–17.

38. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 16 (2001).

39. 2 FARRAND, *supra* note 16, at 57.

40. THE FEDERALIST NO. 68, *supra* note 24, at 435 (Alexander Hamilton).

It was hoped that the President would bring a national character to the new government.<sup>41</sup> As Joseph Story put it, the President "is the representative of the whole nation in the aggregate; [the legislators] are the representatives only of distinct parts; and sometimes of little more than sectional or local interests."<sup>42</sup> Because the manner of his selection would make him responsible to the entire nation, the Framers hoped that the President would use his veto power to check legislation that favored sectional interests and prejudices.<sup>43</sup>

Nor was the Senate a popularly elected body as originally conceived. The original constitutional scheme called for Senators to be chosen by the legislatures of each state, not by the people.<sup>44</sup> John Dickinson, who formulated this scheme of indirect election,<sup>45</sup> saw the states as an American counterpart to the English baronies,<sup>46</sup> and remarked that "[i]n the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England."<sup>47</sup> To provide them with further insulation, Senators were given terms three times as long as their counterparts in the House, and these terms were staggered to ensure that only a third of the Senate could be replaced at each election.<sup>48</sup>

This insulation was precisely why the Convention gave the Senate such an important role in the constitutional conversation.<sup>49</sup> Madison saw the Senate as a "temperate and respectable body of citizens" that, when the passions of the people militated against their own interests, would help to "suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind."<sup>50</sup> The Senate would bring to the new government a

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41. "If Congress . . . tends to reflect the 'local spirit' predicted by Madison, the prime organ of a compensating 'national spirit' is, of course, the President—both as the Chief Executive and as the leader of his party." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States In the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954).

42. STORY, *supra* note 25, at 321.

43. *Id.* at 320-21.

44. U.S. CONST. art. I, § 3, cl. 1.

45. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 213-15 (1985).

46. *Id.* at 215.

47. 1 FARRAND, *supra* note 16, at 136.

48. See U.S. CONST. art. I, § 3, cl. 1-2.

49. See *supra* Part I.A.

50. THE FEDERALIST NO. 63, *supra* note 24, at 404 (James Madison).

needed measure of stability and help to check excesses of the lower house.<sup>51</sup> The Senate is perhaps the best evidence that the difficulty with which the Framers seemed to struggle the most was not Bickel's counter-majoritarian one; instead it was the problem of constructing a government that restrained the majority while at the same time enabling it to rule effectively.<sup>52</sup>

The counter-majoritarian framework of selecting the President and Senators did not endure. The Electoral College proved awkward and unworkable from the beginning.<sup>53</sup> Although still reflected in the constitutional text,<sup>54</sup> it was soon revised dramatically.<sup>55</sup> Growing majoritarian pressures and charges of corruption and deadlock culminated in the adoption of the Seventeenth Amendment<sup>56</sup> in 1913,<sup>57</sup> which ended forever Dickinson's vision of an American House of Lords.<sup>58</sup>

The effects wrought by these structural changes on our constitutional system have arguably lessened the insulation of the modern Presidency and Senate. These effects have been discussed elsewhere,<sup>59</sup> and are beyond the scope of this Note. The

51. See C. H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 15–26 (1995).

52. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *THE FEDERALIST* NO. 51, *supra* note 24, at 331 (James Madison).

53. See DAHL, *supra* note 38, at 77–79.

54. U.S. CONST. art. II, § 1, cl. 2–3, *amended by* U.S. CONST. amend. XII. Much ink has been spilled over the Electoral College. See, e.g., Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467 (2007); see also Birch Bayh, *The Electoral College: An Enigma in a Democratic Society*, 11 VAL. U. L. REV. 315 (1977).

55. See Wechsler, *supra* note 41, at 553–58.

56. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years." U.S. CONST. amend. XVII.

57. See HOEBEKE, *supra* note 51, at 53–108.

58. There is also a fairly robust field of scholarship dealing with the Seventeenth Amendment and its effects. See HOEBEKE, *supra* note 51; see also Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997). For a normative argument that because of the structural changes enacted by the Seventeenth Amendment, the Supreme Court should vigorously enforce the bounds of federalism, see Roger G. Brooks, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987). For a contrary argument, see RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 233–80 (2001).

59. See *supra* notes 55, 58.

important point for present purposes is that although the Framers would have been comfortable with the argument made by Bickel and his fellow advocates of judicial restraint that the political branches have a role to play in constitutional interpretation, they would have been at a loss to understand Bickel's difficulty with counter-majoritarianism. Indeed, the methods of selecting the Senate and the President are not the only elements of the Constitution that "thwart[] the will of representatives of the actual people."<sup>60</sup> The Constitution itself is fundamentally counter-majoritarian.

## II. THE COUNTER-MAJORITARIAN CONSTITUTION

The fundamental purpose of a constitution like ours is not to enable majorities to govern but to restrain them from governing too much.<sup>61</sup> To enable majorities to govern, it is sufficient for a constitution to give all power to a popularly elected legislature, or perhaps directly to the people themselves. Our Constitution does much more than that; indeed, it restrains majorities and protects minorities in two ways: by structurally dividing and balancing the governing authority against itself to encourage discourse and favor the status quo, and by placing certain substantive rights off-limits for all but the most dedicated and sustained supermajorities.<sup>62</sup>

### A. Structural Protections

One structural division of power embedded in the Constitution is federalism. By leaving the bulk of the power in the States and consigning to the central government only those functions pertaining to the nation as a whole, the Framers hoped to establish a government that was "neither wholly *national* nor wholly *federal*."<sup>63</sup> Contrary to the expectations of the Framers, the power

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60. BICKEL, *supra* note 6, at 16–17.

61. "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away." ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40 (Amy Gutmann ed., 1997).

62. The structure-substance distinction is of course somewhat artificial, but it serves to organize our analysis of the Constitution's counter-majoritarian elements.

63. THE FEDERALIST NO. 39, *supra* note 24, at 245 (James Madison). The term "federal" at this time, in part because of the *Federalist*, was transitioning in mean-

of the modern federal government has grown to dwarf that of the States.<sup>64</sup> Nevertheless, the structural device of federalism still roughly serves the purpose of confining national legislation to national interests and state legislation to local interests.

The separation of powers is another structural device designed to restrain the governing majority. This device was viewed as essential to the preservation of individual liberty. As Madison put it, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>65</sup> In addition to separating the three powers from each other, the Framers, mindful that “[i]n republican government, the legislative authority necessarily predominates,” divided the legislature into two separate branches.<sup>66</sup> These three structural protections—federalism, separation of powers, and bicameralism—clearly impede the rate at which change can take place. The complexity of the design makes it difficult for the majority to accomplish anything at all without a sustained, deliberate effort.<sup>67</sup>

This complexity has the additional effect of encouraging deliberation.<sup>68</sup> The Framers drew a distinction between two different types of political deliberation. The first type is the “cool and deliberate sense of the community”<sup>69</sup> that may emerge only after “opportunity for . . . cool and sedate reflection.”<sup>70</sup> The Founders assumed that this steady, deliberate public will would always have the best interest of the people in mind.<sup>71</sup> The second type of deliberation was marked by the “sudden breeze of passion,”<sup>72</sup> and “temporary errors and delusions.”<sup>73</sup>

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ing from referring to a confederacy to referring to a system of divided sovereignty. See MCDONALD, *supra* note 45, at 284.

64. See THE FEDERALIST NO. 17, *supra* note 24, at 101–05 (Alexander Hamilton); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

65. THE FEDERALIST NO. 47, *supra* note 24, at 307–08 (James Madison).

66. THE FEDERALIST NO. 51, *supra* note 24, at 332 (James Madison).

67. See THE FEDERALIST NO. 73, *supra* note 24, at 471 (Alexander Hamilton).

68. “No system could be more admirably contrived to ensure due deliberation and inquiry, and just results in all matters of legislation.” STORY, *supra* note 25, at 254.

69. THE FEDERALIST NO. 63, *supra* note 24, at 403 (James Madison).

70. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

71. See *id.*

72. *Id.*

73. THE FEDERALIST NO. 63, *supra* note 24, at 403 (James Madison).

This unsteady will of the people ran the risk of sacrificing the people's "interests" in favor of their "inclinations."<sup>74</sup>

This mechanism for ensuring that the people's rash impulses would be tempered by wise deliberation corroborates the theory of constitutional interpretation outlined in Part I. The President was given the veto power "as an additional security against the enactment of rash, immature, and improper laws."<sup>75</sup> The Senate was envisioned as "a portion of enlightened citizens"<sup>76</sup> whose "wisdom may best discern the true interest of their country."<sup>77</sup> Interpretation of the Constitution was entrusted to those branches insulated enough to recognize those moments when "the people, stimulated by some irregular passion . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn."<sup>78</sup>

### B. Substantive Protections

The Constitution also restrains the majority in a more substantive way: by safeguarding certain individual rights against majority legislation.<sup>79</sup> By protecting individual rights in Article I, Sections 9 and 10, and in the Bill of Rights,<sup>80</sup> the Framers ensured that the Constitution would empower majorities to rule while protecting minorities from unrestrained majoritarianism. Madison, especially, felt that minorities needed to be given special protection, noting that "[i]f a majority be united by a common interest, the rights of the minority will be insecure."<sup>81</sup>

The Framers' efforts to protect minority rights demonstrate the centrality of deliberation in the constitutional scheme. Minority rights were protected not only by imposing "parchment barriers,"<sup>82</sup> but also by establishing "a body in the Gov[ernment] sufficiently respectable for its wisdom [and] virtue, to aid . . . the preponderance of justice by throwing its weight into that scale."<sup>83</sup> The Framers also hoped that the Senate and the Presi-

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74. See THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

75. STORY, *supra* note 25, at 320; see also *supra* Parts I.A and I.B.

76. 1 FARRAND, *supra* note 16, at 422; see also *supra* Parts I.A and I.B.

77. See THE FEDERALIST NO. 10, *supra* note 24, at 59 (James Madison).

78. THE FEDERALIST NO. 63, *supra* note 24, at 404 (James Madison).

79. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1978).

80. U.S. CONST. amends. I-X.

81. THE FEDERALIST NO. 51, *supra* note 24, at 333 (James Madison).

82. THE FEDERALIST NO. 48, *supra* note 24, at 316 (James Madison).

83. 1 FARRAND, *supra* note 16, at 423.

dent, with their insulation from popular passions and their superior deliberative capacities, would provide a powerful check against legislation that treated vulnerable minorities unjustly.

The Constitution, by setting up a structure that fosters deliberation and safeguards individual rights, is fundamentally counter-majoritarian. Because the Constitution does not create a purely majoritarian form of government, some scholars have argued that the Framers and the Constitution were undemocratic,<sup>84</sup> the last hurrah of a patriarchal society made obsolete by its obsession with monarchy and nobility.<sup>85</sup> Others have faulted the Framers for erecting a counter-majoritarian framework allegedly designed to protect the fatness of their own pocketbooks.<sup>86</sup> These criticisms err because they confuse as synonymous the terms "majoritarian" and "democratic."

Professor Dworkin has asserted that a majoritarian government cannot be defined as democratic unless it protects certain fundamental values from the tyranny of the majority.<sup>87</sup> If democracy is so defined, the Constitution does not succumb to contentions that it is anything less than democratic. A closer look at statements made by the Framers reveals a commitment to this principle of democracy. For example, in justifying the counter-majoritarian institution of judicial review, Alexander Hamilton argued that the institution did not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."<sup>88</sup> The executive's veto power was justified on the same grounds.<sup>89</sup> Because the Constitution was to be adopted by popular convention, the Framers could always have recourse to the principle of popular sovereignty that justified the whole system.<sup>90</sup>

Even if the Constitution is democratic, it undeniably contains certain counter-majoritarian elements that the Framers deemed too important to be left to the whims of popular opinion—the impulsive, second type of deliberation. The Framers looked to

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84. See DAHL, *supra* note 38, at 15–27.

85. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 11–24 (1992) (arguing that pre-Revolutionary America was fundamentally hierarchical).

86. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 73–151 (Free Press 1986) (1913) (arguing that the Constitution protected economic interests of the classes with which the Framers most identified).

87. RONALD DWORKIN, *JUSTICE IN ROBES* 133–34 (2006).

88. *THE FEDERALIST* NO. 78, *supra* note 24, at 499 (Alexander Hamilton).

89. See WOOD, *supra* note 16, at 452–53.

90. See *id.* at 372–83.

the President, the Senate, and the judicial system to protect individual rights precisely because these institutions were insulated from the temporary fits and spurts of the popular will, and thus well suited to engage in cool deliberation. Over two centuries later, the capability of these institutions to perform their deliberative role is in question. Insights gathered from the academic field of media ecology are useful in addressing this issue.

### III. MEDIA ECOLOGY AND INSTITUTIONAL CHANGE

Media ecology is an interdisciplinary academic field that examines the effects on society and institutions brought about by developments in media and technology. The field is often associated with Marshall McLuhan, a media theorist who popularized the concept that “the medium is the message.”<sup>91</sup> This insight highlights an enduring theme of media ecology: as the method of communication changes, the effects of the communication change as well.<sup>92</sup>

Others followed McLuhan, notably Walter Ong and Neil Postman.<sup>93</sup> Although Postman, who was highly critical of the effects of television, was regarded as a “neo-Luddite,”<sup>94</sup> media ecology is not opposed to technological change, but merely examines the effects of that change on society. Postman never argued that technological change was an evil, much less a necessary one. Rather, he argued that technological change was a tradeoff, bringing bad effects along with the good.<sup>95</sup> It is in such a spirit that this Note will use the insights of media ecology to examine the effects of the modern media on the presidency and the Senate.

#### A. *The President*

More than two-hundred years ago, Alexander Hamilton boasted that “[t]he process of election affords a moral certainty, that the office of President will seldom fall to the lot of any man

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91. See LANCE STRATE, *ECHOES AND REFLECTIONS: ON MEDIA ECOLOGY AS A FIELD OF STUDY* 21–23 (2006).

92. MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 18–35 (W. Terrence Gordon ed., Gingko Press 2003) (1964).

93. See STRATE, *supra* note 91, at 5.

94. *Id.* at 53.

95. Neil Postman, *Five Things We Need to Know About Technological Change* (Mar. 27, 1998), <http://www.mat.upm.es/~jcm/neil-postman-five-things.html>.

who is not in an eminent degree endowed with the requisite qualifications."<sup>96</sup> Today, such a statement may be viewed with skepticism. Lawrence Grossman, former president of NBC, remarked that at one time, presidential candidates "*stood* for election, rather than *ran* for election as they do now, in the belief that presidents should preserve the dignity of the high office by staying off the campaign trail."<sup>97</sup> Grossman contrasted this with modern practice by noting that "[i]n 1992, candidate Bill Clinton got more mileage out of joking with a raunchy morning radio talk show host and playing saxophone and wearing dark shades on a late night television talk show than discussing his ideas on health care or welfare reform."<sup>98</sup>

Media scholar Michael O'Neill wrote in 1993 that "[n]ow the qualities needed to win an election are unrelated to the capacity to govern, while the qualities needed to govern are irrelevant to election success."<sup>99</sup> Neil Postman echoed this sentiment in explaining "we may have reached the point where cosmetics has replaced ideology as the field of expertise over which a politician must have competent control."<sup>100</sup> In another work, Postman mused, "I have often wondered how Abraham Lincoln would have fared on television."<sup>101</sup> One wonders whether Postman, author of the seminal 1985 work *Amusing Ourselves to Death*, would have been amused by the 2006 film *Man of the Year*, which depicts a Jon Stewart-style political comedian's rise to the presidency.<sup>102</sup> Postman might have been even less amused when, in 2007, satirist Stephen Colbert announced his own bid for the White House.<sup>103</sup> Postman would probably quote again the words of another actor who ran for President: "Politics," Ronald Reagan said, "is just like show business."<sup>104</sup>

96. THE FEDERALIST NO. 68, *supra* note 24, at 437 (Alexander Hamilton).

97. LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE* 107 (1995).

98. *Id.*

99. MICHAEL J. O'NEILL, *THE ROAR OF THE CROWD: HOW TELEVISION AND PEOPLE POWER ARE CHANGING THE WORLD* 106 (1993).

100. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 4 (Penguin Books 1986) (1985).

101. NEIL POSTMAN, *BUILDING A BRIDGE TO THE 18TH CENTURY: HOW THE PAST CAN IMPROVE OUR FUTURE* 51 (1999).

102. *MAN OF THE YEAR* (Universal Pictures 2006).

103. Katharine Q. Seelye, *Colbert's Presidential Bid Ends After a 'No' in South Carolina*, N.Y. TIMES, Nov. 2, 2007, at A18. That the presidential bid was likely a publicity stunt does not contradict the point, but rather underscores it.

104. Quoted in POSTMAN, *supra* note 100, at 125 (footnote omitted).

One focus of the modern presidential campaign is the televised debate. Of course, pre-television campaigns featured debates as well. Postman described how the format of the August 1858 Lincoln-Douglas debates “provided that [Stephen A.] Douglas would speak first, for one hour; Lincoln would take an hour and a half to reply; Douglas, a half hour to rebut Lincoln’s reply.”<sup>105</sup> These time limitations were likely prompted by an earlier debate, formatted as follows: “Douglas delivered a three-hour address to which Lincoln, by agreement, was to respond. When Lincoln’s turn came, he reminded the audience that it was already 5 p.m. . . . He proposed, therefore, that the audience go home, have dinner, and return refreshed for four more hours of talk. The audience amiably agreed . . .”<sup>106</sup> Today’s televised debates present viewers with a different experience entirely: for example, “the [1984] debates were conceived as boxing matches, the relevant question being, Who KO’d whom? The answer was determined by the ‘style’ of the men—how they looked, fixed their gaze, smiled, and delivered one-liners.”<sup>107</sup>

Once elected, the President is still dependent on public opinion to lead effectively.<sup>108</sup> “The message to American [P]residents” is clear: “the only way to get elected and then stay in power is to submit completely to TV’s way of life. Every public appearance, every statement, every visual prop, every TV ad has to be manipulated to win visibility and attract viewers.”<sup>109</sup> In an era when the presidency is trivialized by the “show business” atmosphere of television, and the President is almost entirely dependent on viewing majorities, it is time to rethink the ability of the President to engage in cool deliberation and protect the rights of disfavored minorities.

### B. *The Senate*

Much of the criticism surrounding the television-era electoral process applies to the Senate as well. The political discourse of election season is a kind of deliberation, but what kind is it? Is it the cool, deliberate sense of the people, or is it marked by temporary delusions and sudden breezes of passion?<sup>110</sup> O’Neill

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105. *Id.* at 44.

106. *Id.* (footnote omitted).

107. *Id.* at 97.

108. GROSSMAN, *supra* note 97, at 64.

109. O’NEILL, *supra* note 99, at 119.

110. *See supra* Part II.A.

suggested the latter: "The emphasis is on emotions and personality, slogans instead of ideas and image instead of reality. The method is to impress rather than to reason because there is no space in a sound bite for thought and no time for . . . deliberative debate."<sup>111</sup> "The problem," according to Postman, "is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining."<sup>112</sup> The result is that "Americans are the best entertained and quite likely the least well-informed people in the Western world."<sup>113</sup> Television campaigning, said Senator John Danforth of Missouri, "has locked candidates into ridiculous positions because only ridiculous positions can be compacted into 30-second commercials."<sup>114</sup>

Television has had a marked effect on the Senate, and not just at election time: "In the United States, government has become a permanent political campaign."<sup>115</sup> The existence of a public opinion poll for every issue has dampened the deliberative capacity of the Senate. As political scholar Harry Boyte explained, "We have public opinion now, which is people's private reflexes. But we don't have public judgment."<sup>116</sup> Congressional scholars Thomas Mann and Norman Ornstein reported that there has been "a measurable decline in the quantity and quality of deliberation" in both houses of Congress.<sup>117</sup> "Congressmen," O'Neill wrote, "now are so afraid to lead they wait for the polls to tell them what to think and do."<sup>118</sup>

A study of the Senate's changing institutional norms during the last century revealed that although institutional expectations in the 1960s frowned on "show horse" speeches calculated to gain media attention,<sup>119</sup> by 1990 it was "no longer the case that a proper senator is expected to take a vow of abstinence from the attractions of the mass media . . . . Increasingly, those who play

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111. O'NEILL, *supra* note 99, at 106–07.

112. POSTMAN, *supra* note 100, at 87.

113. *Id.* at 106.

114. Michael Oreskes, *American Politics Loses Way as Polls Displace Leadership*, N.Y. TIMES, Mar. 18, 1990, at A1.

115. GROSSMAN, *supra* note 97, at 64.

116. Oreskes, *supra* note 114.

117. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 216 (2006).

118. O'NEILL, *supra* note 99, at 133.

119. John R. Hibbing & Sue Thomas, *The Modern United States Senate: What is Accorded Respect*, 52 J. POL. 126, 135 (1990).

nothing but the quiet, behind-the-scenes game are viewed as unusual."<sup>120</sup> Such pandering to the cameras was precisely the fear that motivated the opponents of televising the Senate in the late 1980s.<sup>121</sup>

The modern Senate described by these media theorists seems a far cry from the Framers' vision of "a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose ag[ainst] impetuous counsels."<sup>122</sup> It is no longer reasonable to expect the modern Senate to protect the "interests" of the people without yielding to their "inclinations."<sup>123</sup>

Television's effect on the Senate, both during and after the campaign season, has produced an important byproduct: the heightened influence of money. "The whole character of Congress has changed. Between image-making and raising money to pay for image-making, the members have little time to run the government."<sup>124</sup> Mann and Ornstein have documented "the startling rise of earmarking" as "[a]nother sign of the decline of the deliberative process."<sup>125</sup> "Earmark fever," they allege, "has completely taken over the appropriations process."<sup>126</sup> Professor Cass Sunstein explained the origin of this development:

[T]he original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures. . . . That system of insulation has broken down with the decline of the electoral college, direct election of senators, and, most important, technological developments that have enabled private groups to exert continuing influence over representatives. In these circumstances, it is neither surprising nor inappropriate that the judicial role has expanded . . . .<sup>127</sup>

Professor Sunstein's conclusion concerning the expanded judicial role is the subject of the final Part of this Note.

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120. *Id.* at 143.

121. Richard F. Fenno, Jr., *The Senate Through the Looking Glass: The Debate over Television*, 14 LEGIS. STUD. Q. 313, 324 (1989).

122. 1 FARRAND, *supra* note 16, at 422.

123. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

124. O'NEILL, *supra* note 99, at 133.

125. MANN & ORNSTEIN, *supra* note 117, at 175.

126. *Id.* at 176.

127. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

IV. JUDICIAL MINIMALISM AND THE EROSION OF  
POLITICAL DELIBERATION

Judicial minimalism aims to give the political branches as broad a role in the constitutional interpretive conversation as possible.<sup>128</sup> This theory of deference is perhaps most boldly stated by Justice Brandeis in his 1936 concurrence in *Ashwander v. Tennessee Valley Authority*: “The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”<sup>129</sup> This “last resort rule”<sup>130</sup> is not without its advocates; indeed, the current Chief Justice is a minimalist.<sup>131</sup> It remains to be seen whether Chief Justice Roberts will be able to move the Court in the direction of judicial humility.<sup>132</sup>

Judicial minimalism relies on the assumptions that all three branches should have a role to play in interpreting the Constitution, and the Court lacks the democratic pedigree to trump, at least brazenly, the constitutional choices of its counterparts.<sup>133</sup> The Framers also believed that the political branches, notably the President and the Senate, would have important voices in the interpretive conversation because of their insulation from the popular will, not because of their responsibility to it.<sup>134</sup> This insulation was important because of the counter-majoritarian nature of the Constitution itself. Theories of democratic legitimacy and popular sovereignty were vital to the legitimacy of the Constitution, but the Framers were not interested in entrusting the fate of future minorities entirely to the possibly misguided impulses of future majorities. Insulation was therefore a critical attribute for the interpreters of the constitutional text.

With political developments such as the Seventeenth Amendment and technological developments such as the ad-

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128. See *supra* text accompanying notes 1–12.

129. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

130. See generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (outlining the history of the *Ashwander* avoidance canon’s development and application).

131. See *supra* text accompanying notes 11–12.

132. Cf. Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts’s Revolution of Restraint*, 34 PEPP. L. REV. 495 (2007) (providing an overview of the Court’s first term with Chief Justice Roberts presiding in his new role).

133. See Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 23 (2007).

134. See *supra* Part I.

vent of television, this insulation has eroded. In the climate of television-era politics, citizens would be foolish to look to the President and Senate to enforce the constitutional restraints on the majority's will.<sup>135</sup> Recent developments merit a fundamental rethinking of the role of these institutions in interpreting the Constitution. If the President and the Senate are to have a voice in the interpretive conversation, the assumption must be that they have something worthwhile to say. The insights gleaned from the media-ecological analysis of the current condition of these institutions suggest that they are no longer capable of engaging in serious constitutional deliberation. The inference from these premises is clear: if the counter-majoritarian restraints of the Constitution are still worth enforcing, society must look to the courts, and not to the political branches, to enforce them. Although the Framers themselves never made this argument, it is the best way of preserving the original constitutional system now functioning in a world that the Founders would hardly have recognized. It is an originalist's argument, even if it did not originate in the eighteenth century.

The argument is not completely new. In some ways, it is as old as the very concept of judicial review. In *Marbury v. Madison*, Chief Justice Marshall wrote that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>136</sup> Later, he remarked that "[t]he judiciary cannot . . . avoid a measure because it approaches the confines of the [C]onstitution. We cannot pass it by because it is doubtful. . . . [T]o decline the exercise of jurisdiction which is given . . . would be treason to the [C]onstitution."<sup>137</sup> Nearly a century and a half later, Justice Black echoed Chief Justice Marshall in writing that "when judges have a constitutional question in a case before them, and the public interest calls for its decision, refusal to carry out their duty to decide would . . . be an evasion of responsibility."<sup>138</sup> And almost thirty-five years later, Justice Scalia made a similar statement when he referred to the Court's reputation as "working armor [that is] meant to be used and sometimes dented in the service of the public."<sup>139</sup>

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135. See *supra* Part III.

136. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

137. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). The quoted text is dictum and should thus be understood as hortatory rather than obligatory.

138. HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 20 (Knopf 1969) (1968).

139. Greg Pierce, *Scalia Defends Decision*, WASH. TIMES, May 25, 2001, at A6.

The argument here presented is not meant to imply that the Court should be given license to thwart the will of the people whenever it suits the fancy of five Supreme Court Justices. Justice Black recognized, as does Justice Scalia today, that judicial review must be principled and firmly grounded in the text of the Constitution if it is to endure.<sup>140</sup> Vigorously enforcing the provisions of the Constitution does not equate to thwarting the will of the people. Such vigorous enforcement may thwart the desires of a temporary majority, but it does so in favor of constitutional protections that were ratified by the people and given two centuries of tacit consent. These protections may therefore be considered the most genuine embodiment of the people's enduring will.

Perhaps we do not take original understanding to be authoritative; we might no longer believe that the counter-majoritarian restraints embodied in the Constitution are worth enforcing. Perhaps we no longer share the Founders' fear of the "impulse of sudden and violent passions,"<sup>141</sup> or their belief in two types of public deliberation. Perhaps such notions are too undemocratic for today's palate—too elitist, narrow-minded, selfish. But no matter how strong our faith in the people might be, we would do well to listen to Alexander Hamilton's sage advice that "the people commonly *intend* the Public Good. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err . . . ."<sup>142</sup> If Hamilton is correct, the counter-majoritarian nature of judicial review, far from being the difficulty some suppose, is its greatest recommendation.

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140. See BLACK, *supra* note 138; see also Scalia, *supra* note 61, at 38.

141. THE FEDERALIST NO. 62, *supra* note 24, at 397 (James Madison).

142. THE FEDERALIST NO. 71, *supra* note 24, at 458 (Alexander Hamilton).

## RECENT DEVELOPMENTS

### RECONCEPTUALIZING SPLIT-RECOVERY STATUTES: *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)

Many believe that punitive damage awards have spiraled out of control. In 2002, a California jury awarded \$28 billion in punitive damages to a 64-year-old woman with lung cancer.<sup>1</sup> In 2000, a Florida jury awarded \$145 billion in punitive damages to a class of Florida smokers.<sup>2</sup> These are not isolated decisions; they represent a pattern of extraordinarily high punitive damage awards handed down by juries.<sup>3</sup> States have responded to these excessive awards in three ways. Some have barred punitive damages altogether,<sup>4</sup> others have adopted a cap on such awards,<sup>5</sup> and still others have implemented split-recovery statutes.<sup>6</sup> Of these three responses, the split-recovery system is

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1. See *Bullock v. Philip Morris, Inc.*, No. BC249171, 2002 WL 31833905 (Cal. App. Dep't Super. Ct. Dec. 18, 2002) (remitting the award to \$28 million). On appeal, this case was one of the first to be affected by the United States Supreme Court's decision in *Philip Morris*. See *Bullock v. Philip Morris USA, Inc.*, No. B164398, 2008 WL 240989 (Cal. Ct. App. Jan. 30, 2008) (vacating judgment as to damages and ordering a retrial in a manner consistent with *Philip Morris*).

2. See *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000), *rev'd* *Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).

3. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 6-8 (2004) (identifying more than sixty-three \$100 million-plus punitive damage awards between 1985 and 2003, twelve of which were over \$1 billion).

4. See, e.g., N.H. REV. STAT. ANN. § 507:16 (1986). Nebraska is unique in that its constitution bars punitive damage awards. See *Distinctive Printing and Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) (finding punitive damages barred by NEB. CONST. art. VII, § 5).

5. See, e.g., ALA. CODE § 6-11-21 (2005); IND. CODE ANN. § 34-51-3-4 (West 1999). Some set the cap at a specific number, others use a ratio to compensatory damages, and still others use a combination of both.

6. Nine states currently provide for split-recovery: ALASKA STAT. § 09.17.020(j) (2006) (50% to the state); GA. CODE ANN. § 51-12-5.1(e)(2) (1998) (75% to the state); 735 ILL. COMP. STAT. 5/2-1207 (2006) (discretionary); IND. CODE ANN. § 34-51-3-6 (West 1999) (75% to the state); IOWA CODE ANN. § 668A.1(2)(b) (West 1998) (75% to the state); MO. ANN. STAT. § 537.675(2) (West 2000) (50% to the state); OR. REV. STAT. § 31.735 (2005) (60% to the state); UTAH CODE ANN. § 78-18-1(3) (2002) (50% to the state); *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002) (recognizing Ohio courts' common law authority to apportion the award as

functionally and constitutionally unique.<sup>7</sup> Often coupled with more searching judicial review of multiple punitive damage awards,<sup>8</sup> this framework shifts a portion of the punitive damage award to society.

Last Term, in *Philip Morris USA v. Williams*,<sup>9</sup> the Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits state juries from punishing a defendant for harm caused to in-state nonparties (potential plaintiffs not before the court), even as the Court reaffirmed a punitive damage framework requiring those same juries to take these harms into account when determining the conduct's reprehensibility.<sup>10</sup> By firmly closing the door to recovery for harms to nonparties—a door left ajar in *State Farm Mutual Automobile Insurance Company v. Campbell*<sup>11</sup>—the Court finally articulated a comprehensive and coherent approach to third-party harms in punitive damage cases. In doing so, however, the Court called into question the primary justification for the split-recovery, multiple punitive-damage review system that states began implementing in the 1980s in response to inflated awards.

In 1997, Mayola Williams filed suit against Philip Morris in Oregon state court.<sup>12</sup> She alleged negligence and deceit against Philip Morris in the death of her husband, Jesse Williams, a

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appropriate). Perhaps in response to *Dardinger*, other states have expressly prohibited splitting punitive damage awards. See, e.g., ALA. CODE § 6-11-21(l) (2005).

7. See Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised By Statutes That Require Punitive Damages Awards To Be Shared With The State*, 68 MO. L. REV. 525, 548–56 (2003) (noting the special due process problems posed by a split-recovery system).

8. See, e.g., FLA. STAT. ANN. § 768.73(2)(a) (West 2005) (“[P]unitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant . . . from the same act or single course of conduct . . .”); GA. CODE ANN. § 51-12-5.1(e)(1) (1998) (limiting recovery to one punitive damages award for product liability actions).

9. 127 S. Ct. 1057 (2007).

10. See *id.* at 1064. The Court sidestepped what was certainly the more anticipated of the two questions for which the Court granted certiorari—whether the constitutional ceiling on the punitive damages ratio, originally suggested in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 23–24 (1991), could be overcome by a finding that conduct was “highly reprehensible and analogous to a crime.” Petition for Writ of Certiorari, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256).

11. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003). *State Farm* involved claims of bad faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress.

12. Ms. Williams filed on behalf of her husband's estate.

heavy cigarette smoker who died of lung cancer at the age of sixty-seven.<sup>13</sup> At trial, the plaintiff's attorney asked the jury to consider how many other similarly harmed persons there had been in the State of Oregon over the past forty years.<sup>14</sup> Finding that Mr. Williams's death had indeed been caused by smoking; that he smoked because he believed it was safe to do so; and that Philip Morris "knowingly and falsely" encouraged this belief, the jury returned a compensatory damage award of \$821,000 and a punitive damage award of \$79.5 million in favor of the plaintiff (a ratio of roughly ninety-seven to one).<sup>15</sup>

After exhausting its state appellate remedies,<sup>16</sup> Philip Morris, claiming that the punitive damage award in favor of Mrs. Williams was constitutionally excessive and procedurally unsound, petitioned the Supreme Court for review.<sup>17</sup> The Court remanded the case for reconsideration in light of *State Farm*,<sup>18</sup> a then-recent and significant development in the Supreme Court's punitive damages doctrine.<sup>19</sup> The Oregon Supreme Court reviewed and affirmed the punitive damages award, despite the Court's language in *State Farm*.<sup>20</sup> Specifically, the court found that *State Farm*, although prohibiting punishment for *dissimilar* harms, as well as harms to *out-of-state* parties, did not prohibit a jury from punishing a defendant for *similar* harms to *in-state* parties not before the court, and that the extreme reprehensibility and near criminality of Philip Morris's actions justified the high ratio of punitive to compensatory damages.<sup>21</sup> On petition by Philip Morris, the United States Supreme Court granted certiorari.

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13. See *Philip Morris*, 127 S. Ct. at 1060.

14. See *id.* at 1061.

15. *Id.*

16. The Oregon State Supreme Court denied review after the court of appeals affirmed.

17. These were the same claims ultimately before the Court in 2006. See *Philip Morris*, 127 S. Ct. at 1062.

18. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–25 (2003) (finding that "[a] defendant's dissimilar acts . . . may not serve as the basis for punitive damages," that "each State alone can determine what measure of punishment . . . to impose on [one acting] within its jurisdiction," and that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

19. See *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

20. See *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2006).

21. See *id.* at 1176, 1181.

The Supreme Court vacated and remanded. Writing for the Court, Justice Breyer<sup>22</sup> began by reaffirming both the state's legitimate interest in using punitive damages to punish and deter unlawful conduct and the need to balance these interests against the potentially unfair or arbitrary nature of a discretionary punitive damages award.<sup>23</sup> To balance these competing concerns, the Due Process Clause mandates both procedural requirements and excessiveness review.<sup>24</sup> Deferring the question of excessiveness review, the Court focused instead on the Constitution's procedural requirements, finding that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties—strangers to the litigation."<sup>25</sup> Not only would such an award eliminate the defendant's ability to "present every available defense," but it would also introduce a "standardless dimension to the punitive damages equation," leaving the jury to speculate about both the number of nonparties and the degree of harm to those parties.<sup>26</sup>

Cognizant of the conflict between this position and the Court's established reprehensibility calculus, which requires a jury to consider evidence of harm to nonparties, the Court suggested that it would not require perfection.<sup>27</sup> The Due Process

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22. Justice Breyer was joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito.

23. See *Philip Morris*, 127 S. Ct. at 1062.

24. See *id.* To date, the Court has been much clearer on excessiveness review, which takes the form of a three-part test. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–85 (1996). Procedural requirements have come piecemeal. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (requiring judicial review of the size of punitive awards); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* review of punitive awards).

25. *Philip Morris*, 127 S. Ct. at 1063.

26. *Id.*

27. See *id.* at 1065. As has been widely recognized, the Court's decision puts jurors in an almost impossible situation. North Dakota's Pattern Jury Instruction Commission has attempted to remedy this problem with the following jury instruction, intended to be used in cases where there has been evidence or argument concerning the defendant's harmful conduct toward nonparties:

In considering an award of exemplary or punitive damages, you may, in determining the reprehensibility of the Defendant's conduct, consider the harm the Defendant's conduct has caused to others. You may not, however, punish the Defendant for harm caused to others whose cases are not before you. You may punish the Defendant only for harm done to the Plaintiff.

State Bar of North Dakota, Pattern Jury Instruction C-72.07, available at [http://www.sband.org/Pattern\\_Jury\\_Instructions/viewarticle.asp?ID=645&parent\\_category=civil](http://www.sband.org/Pattern_Jury_Instructions/viewarticle.asp?ID=645&parent_category=civil).

Clause, the Court held, simply requires that state courts “provide assurance that the jury will ask the right question[s]” — questions that track the thin line between reprehensibility and punishment—and “avoid procedure that unnecessarily deprives juries of proper legal guidance.”<sup>28</sup> Simply put, courts cannot sanction procedures that “create an unreasonable and unnecessary risk of . . . confusion” between reprehensibility analysis and punishment.<sup>29</sup> Because the Constitution simply requires “some form of protection in appropriate cases,” states “have some flexibility to determine what *kind* of procedures they will implement.”<sup>30</sup>

Justice Stevens dissented, adopting, in large part, the reasoning of the Supreme Court of Oregon.<sup>31</sup> He argued that States do have an interest in using punitive damages to punish wrongdoers “for harming persons who are not before the court,” so long as the award remains non-compensatory.<sup>32</sup> Punitive damages, unlike compensatory damages, are designed to account for “the public harm [of] the defendant’s conduct.”<sup>33</sup> Furthermore, Justice

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28. *Philip Morris*, 127 S. Ct. at 1064. Perhaps the best analog to this split is the one the Court itself suggests. In *Witte v. United States*, 515 U.S. 389 (1995), the Court held that recidivism statutes do not impose an “additional penalty for the earlier crimes but instead . . . a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.” *Id.* at 400 (internal quotation marks omitted). Punitive awards should operate in the same way, with evidence of similar harm to nonparties justifying a higher award only by making the particular harm before the court more offensive.

29. *Philip Morris*, 127 S. Ct. at 1065.

30. *Id.* at 1065. Although the Court did not advance a particular method for meeting this new requirement, it did look favorably upon the jury instruction requested by Philip Morris. *Id.* at 1064. That instruction went, in part, as follows:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

*Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 (Or. 2006).

31. See *Philip Morris*, 127 S. Ct. at 1065–67 (Stevens, J., dissenting).

32. *Id.* at 1066 (internal quotation marks omitted). According to Justice Stevens, awarding “compensatory damages to remedy . . . third-party harm might well [deny] due process.” *Id.*

33. *Id.*

Stevens contended that the majority's distinction between direct and indirect use of third-party harm<sup>34</sup> was illusory.<sup>35</sup>

Justice Thomas dissented. Although he joined Justice Ginsburg's dissenting opinion, Justice Thomas wrote separately to reiterate his position in *State Farm* that "the Constitution does not constrain the size of punitive damages awards."<sup>36</sup>

Justice Ginsburg also dissented.<sup>37</sup> She began by stating that the actions taken by the Oregon court were fully consistent with the approach articulated by the majority; that is, nothing suggested that the trial court failed to provide the jury with proper legal guidance.<sup>38</sup> Justice Ginsburg continued by arguing that the issue presented to the Court was the propriety of the defendant's jury instruction. Finding the instruction confusing, and thus the Oregon court's rejection of it appropriate, she reasoned that the Court should not have gone beyond the issue presented.<sup>39</sup>

The outcome in *Philip Morris* was widely predicted. Although allowing the jury to punish defendants for similar in-state harms would not have been inconsistent with earlier decisions, it would have complicated an already difficult remedial framework.<sup>40</sup> The Court's decision, however, has larger consequences for the social-interest theory of punitive damages, and is therefore likely to have ramifications for statutes that justify split recovery by focusing on the dual harm to society and the individual.

Academic commentators have already suggested two competing paradigms by which to conceptualize punitive damage awards.<sup>41</sup> The first, traditional, approach is the individual-

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34. *Id.* at 1064. The distinction was between punishment for harms to third parties and punishment in light of harms to third parties, the reprehensibility of which increases the punishment for the instant injury accordingly.

35. *Id.* at 1067.

36. *Id.* (Thomas, J., dissenting) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429–30 (2003) (Thomas, J., dissenting) (quotation marks omitted)).

37. Justice Ginsburg was joined by Justices Scalia and Thomas.

38. See *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

39. *Id.* at 1069.

40. These complications would have been exacerbated by forcing juries to make similarity determinations about hypothetical claims.

41. For a general discussion, see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 356–70 (2003). Both paradigms are consistent with the punitive- and deterrence-based rationale articulated by the Court in *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

interest paradigm.<sup>42</sup> Under this theory, punitive awards are by nature retributive and designed to punish egregious or offensive conduct.<sup>43</sup> The second approach, referenced above, is the social-interest paradigm. Under this theory, punitive damage awards are designed to advance social agendas, which are likely to be focused on deterrence.<sup>44</sup> They may, however, be motivated by other justifications, including retribution for anti-social behavior<sup>45</sup> and, theoretically, social compensation.<sup>46</sup>

Over the past 15 years, starting with *BMW of North America, Inc. v. Gore*<sup>47</sup> and proceeding through *State Farm*, the Court has consistently struck down attempts to divorce punitive damage awards from the harm before the court. In *Gore*, the Court made clear that punitive damages could not be designed to account for conduct that may be lawful in other jurisdictions.<sup>48</sup> In *State Farm*, the Court went further, finding that dissimilar harms, lawful or not, and all out-of-state harms were off-limits for juries, and reminding courts that they “must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and [the] damages recovered.”<sup>49</sup> In *Philip Morris*, the Court has finally come full circle, reaffirming

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42. See Sharkey, *supra* note 41, at 359 (noting that “individually oriented, retributive punishment” remains the prevailing justification for punitive damages). Historically this was the primary, if not exclusive, use of punitive damages. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 628–29 (2003).

43. See Colby, *supra* note 42, at 628 (“[P]unitive damages . . . were consciously limited to the amount necessary to punish the defendant for the wrong done . . . to the individual plaintiff only.”).

44. The social deterrence approach is the most intuitively appealing justification for a split-recovery statute. More generally, it is also the most popular approach to punitive damages among law and economics theorists. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) (stating that the primary use of punitive damages should be to facilitate optimal deterrence where there is less than a 100% detection rate).

45. See Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497 (2002) (noting that split-recovery statutes describe the purpose of punitive awards as vindicating public wrongs).

46. See Sharkey, *supra* note 41, at 389 (suggesting that punitive damages could account for harms that “reach far beyond the individual plaintiff before the court”).

47. 517 U.S. 559 (1996).

48. See *id.* at 572. In *Gore*, the plaintiff initiated suit after discovering that his car dealer had failed to disclose that his car had been damaged and repainted before his purchase. As noted above, *Gore* is best known for establishing the Court’s current approach to excessiveness review.

49. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).

its previous position, while clarifying that a punitive award cannot be used to account for similar harm to in-state nonparties.<sup>50</sup>

By prohibiting consideration of third-party harm, the Court has, under the guise of the Due Process Clause, mandated an individual-oriented punitive framework. This renders two goals of the social-interest paradigm constitutionally illegitimate: states may no longer use punitive damages to encourage socially optimal deterrence as traditionally conceived—where the focus is on creating full internalization of harm in a world of partial enforcement—or to advance a social compensation goal.<sup>51</sup>

This effect has passed largely unnoticed.<sup>52</sup> Although modern split-recovery statutes are not necessarily tied to the social-interest paradigm,<sup>53</sup> they have, in practice, been wedded to the social-interest paradigm as state courts “search[ed] [for] a justifying theory.”<sup>54</sup> Moreover, the assertion that punitive damages address social rather than individual interests has intuitive appeal in the split-recovery context. With a clear interest in the judgment, society has a better claim to the “windfall” than the individuals to whom the judgment was awarded. Whereas most courts have been guarded in their treatment of exactly how society’s interests are vindicated by punitive damages awards,<sup>55</sup> the Court’s decision in *Philip Morris*, by invalidating much of the social-interest paradigm, will nevertheless force a general reassessment of these statutes.

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50. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007).

51. In other words, award-multiplication approaches of the type championed by Professors Polinsky and Shavell, Polinsky & Shavell, *supra* note 44, are unconstitutional, as are the absent- or quasi-plaintiff and diffuse-harm recovery theories suggested by Professor Sharkey, Sharkey, *supra* note 41, at 392–401.

52. The social compensation goal was a relatively novel position on punitive damages and the social-deterrence goal had been handicapped by *State Farm*. See 538 U.S. at 427 (stating that the probability of detection (on a national level) has “little to do with the actual harm sustained” and so no bearing on the reasonableness of the size of the award).

53. As described below, arguments for splitting the award regardless of its origin do exist.

54. Sharkey, *supra* note 41, at 372, 375; see, e.g., *DeMendoza v. Huffman*, 51 P.3d 1232, 1238 (Or. 2002) (finding that punitive damages in Oregon are designed simply to “vindicate[s] society’s interests,” not those of an individual plaintiff); *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145 (Ohio 2002) (finding that “[t]he plaintiff remains a party, but the de facto party is our society”).

55. Perhaps this is because those state courts that have been the most outspoken in adopting a particular approach—Utah and Oregon—have been consistently overturned by the Supreme Court.

This does not mean that states with split-recovery statutes need to abandon them altogether. As suggested above, it remains clear that states can constitutionally impose limits upon punitive damage recovery.<sup>56</sup> Although *Philip Morris* outlawed social-interest theories based around social-harm, it does not affect social-interest theories based around individual-harm. What split-recovery states require is a compelling theory of why the state, rather than the individual, is the proper place for the damages to be apportioned, even when the harm the punitive damage award is designed to address is focused upon the individual before the court.

States could articulate a revenue justification for their split recovery frameworks—that the state’s interest in realizing revenue justifies imposing what amounts to a large tax on non-compensatory awards. Alternatively, splitting recovery could be used as a method for discouraging certain types of disfavored lawsuits.<sup>57</sup> Both would be consistent with *Philip Morris*, but neither is especially persuasive given how small and unpredictable a source of revenue punitive damage awards would be and given other, more effective methods for filtering out non-meritorious claims. Ultimately, these statutes can and must be more convincingly reconceptualized along a social-retribution paradigm that conceives of punitive awards as a way to vindicate broader outrage against socially impermissible conduct.

In the meantime, the Court’s stronger procedural protections should remedy the most common concerns associated with “blockbuster” punitive damage awards—redundant awards and major windfalls. Without recourse to harm beyond the instant plaintiff, a recurrence of the sizable awards noted above seems unlikely, whether or not juries can cabin their tendency toward excess. This should gut the case for complicated

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56. Courts have allowed states nearly unlimited flexibility in adjusting the size and availability of punitive damage recovery, as evidenced by the proliferation of statutory schemes discussed in this Comment. *But see* *Kirk v. Denver Publ’g Co.*, 818 P.2d 262, 270–72 (Colo. 1991) (declaring Colorado’s split-recovery statute unconstitutional). In fact, the continuing constitutionality of punitive damages generally may require placing them into a more involved statutory framework. See Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

57. The method of discouragement may be legitimate in cases where it is likely that the punitive damages would outpace the offense suffered and so overincentivize suit.

frameworks of state intervention, and may result in a relaxation of punitive damage controls more generally. States may simply find that, under an individual-harm framework, caps, rather than split-recovery statutes, are better at resolving the concerns associated with punitive awards that remain after *Philip Morris*.<sup>58</sup>

Stripped of their most popular foundation, the justification for split-recovery statutes is more uncertain after *Philip Morris* than at any time since their emergence. A major reassessment of these statutes is likely, and may ultimately result in either the abandonment or a reconceptualization of punitive damages as an expression of social outrage.

*Paul B. Rietema*

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58. For example, caps solve continuing problems with jury irrationality while split-recovery statutes do not.

PLAYING LAWYERS: THE IMPLICATIONS OF  
ENDOWING PARENTS WITH SUBSTANTIVE RIGHTS  
UNDER IDEA IN

*Winkelman v. Parma City School District*,  
127 S. Ct. 1994 (2007)

Congress has long struggled with how best to protect the educational interests of children with disabilities.<sup>1</sup> The Individuals with Disabilities Education Act (IDEA)<sup>2</sup> seeks to prevent discrimination against children with disabilities and to assist in providing them a free appropriate public education (FAPE) by authorizing federal grants to states.<sup>3</sup> The Act also supplies legal remedies if a child with a disability is not given a FAPE.<sup>4</sup> Until recently, courts of appeals have disagreed about whether parents of children with disabilities may prosecute IDEA claims *pro se* in federal court.<sup>5</sup> Last Term, in *Winkelman v.*

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1. Congress first attempted to address discrimination against children with disabilities in 1970 through the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175, and then again in the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773. After changing the title of the EAHCA to the Individuals with Disabilities Education Act in 1990, Pub. L. No. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141-42, Congress again reauthorized and revised the Act in 1997, Pub. L. No. 105-17, 111 Stat. 88, and in 2004, Pub. L. No. 108-446, 118 Stat. 2647.

2. Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

3. See 20 U.S.C. §§ 1400(c)(6), (c)(7)(A), (d)(1)(A), 1412(a)(1)(A) (2000).

4. See generally *id.* § 1415.

5. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1999 (2007). See, e.g., *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 249-250 (1st Cir. 2003) (interpreting parents to be "parties aggrieved" under the IDEA and thus having the right to bring a civil action *pro se*); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005) (holding that "the right of [a] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents"); see also Charles J. Russo, *The Rights of Non-Attorney Parents Under the IDEA: Winkelman v. Parma City School District*, 221 EDUC. L. REP. 1, 2 (2007) ("On the one hand, the First Circuit, and a federal trial court in California, held that there are no limits on the ability of parents to act on behalf of their children or themselves in judicial proceedings. Yet, three other federal circuits, the Third, Seventh, and Eleventh, agreed that parents can only represent their own interests, not those of their children, in court actions. Finally, the Second Circuit, the federal trial court in Oregon, and the Sixth Circuit, in two separate cases, found that parents who are not attorneys are prohibited from initiating judicial proceedings on behalf of themselves or their children.").

*Parma City School District*, the Supreme Court held that parents of a child with autism spectrum disorder were “entitled to prosecute IDEA claims,” including substantive claims to a FAPE, on their own behalf—effectively allowing parents to litigate their children’s substantive interests.<sup>6</sup> The Court in *Winkelman* failed to consider the policies underlying the common law prohibition against non-attorney representation. An analysis of the relevant common law principles reveals that such representation compromises the state’s interest in regulating the practice of law and the rights of the children themselves.

Between 2001 and 2003, Jeff and Sandee Winkelman worked in conjunction with the Parma City School District to develop an Individualized Education Program (IEP) that would allow their autistic son Jacob to attend a specialized, private preschool.<sup>7</sup> When Jacob was entering kindergarten, however, the school district’s proposed IEP placed him in the special education room at a public elementary school.<sup>8</sup> The Winkelmans desired that he be placed in a private school specializing in autism.<sup>9</sup> Without an attorney, the Winkelmans, claiming that Jacob had been denied his right to a FAPE, proceeded through the various stages of administrative review provided for under IDEA.<sup>10</sup> Having lost at each stage of administrative appeal, the Winkelmans, “on their own behalf and on behalf of Jacob,” sought a remedy in the United States District Court for the Northern District of Ohio.<sup>11</sup>

The district court found that the school district had provided Jacob a FAPE.<sup>12</sup> The court reasoned that, although the school district had failed to provide “goals and objectives for occupational therapy” in Jacob’s IEP, this “only constituted a procedural technical violation of the IDEA and not reversible error.”<sup>13</sup> The court further reasoned that Jacob’s placement in a public school was justifiable in light of the “overwhelming consensus

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6. See *Winkelman*, 127 S. Ct. at 2005–06.

7. See *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722, 725 (N.D. Ohio 2005).

8. See *id.*

9. See *id.* (“Specifically, they complained that the proposed 2003–04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy nor one-on-one interaction, and did not contain any specific plan to implement the need for occupational therapy.”).

10. See *Winkelman*, 127 S. Ct. at 1998.

11. *Id.*

12. See *Winkelman*, 411 F. Supp. 2d at 734.

13. *Id.* at 731.

that Jacob need[ed] more peer interaction and that he would receive some educational benefits from [the public school].”<sup>14</sup> Thus, based on the pleadings and records from the administrative hearings, the district court upheld the IEP and assigned the Winkelmans to bear their own costs.<sup>15</sup>

Continuing to proceed *pro se*, the Winkelmans appealed to the United States Court of Appeals for the Sixth Circuit.<sup>16</sup> Before reaching the merits of the case, the Sixth Circuit evaluated the plaintiffs’ standing under IDEA to appear *pro se* on behalf of Jacob.<sup>17</sup> Citing its recent holding in *Cavanaugh v. Cardinal Local School District*,<sup>18</sup> the court held that the IDEA does not abrogate the common law rule preventing non-attorney parents from representing their minor children *pro se*.<sup>19</sup> Looking primarily to legislative intent, the court reasoned that Congress would have carved out an exception for parents to represent children in federal proceedings if it had intended them to have such a right.<sup>20</sup> The court further cited *Cavanaugh* for the proposition that “IDEA does not grant parents a substantive right to have their child receive a free appropriate public education.”<sup>21</sup> The Sixth Circuit dismissed the appeal with the caveat that the Winkelmans could continue to pursue the claim if they obtained an attorney within thirty days of the entry of the opinion.<sup>22</sup>

The Supreme Court reversed. Writing for the Court, Justice Kennedy held that “IDEA grants parents independent, enforceable rights” that “encompass the entitlement to a free appropriate public education.”<sup>23</sup> The Court was faced with two distinct inquiries: whether parents have substantive rights under IDEA independent of their children’s rights, and whether non-lawyer parents can represent their children *pro se* under

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14. *Id.* at 733.

15. *See id.* at 734.

16. *See Winkelman v. Parma City Sch. Dist.*, 150 F. App’x 406 (6th Cir. 2005).

17. *Id.* at 406.

18. 409 F.3d 753 (6th Cir. 2005).

19. *See Winkelman*, 150 F. App’x at 406.

20. *See id.* at 407 (“In reaching [the] conclusion [in *Cavanaugh*], we reasoned that the IDEA ‘expressly provided that parents were entitled to represent their child in administrative proceedings’ but did not ‘carve out an exception to permit parents to represent their child in federal proceedings,’ an omission that prompted the inference ‘that Congress only intended to let parents represent their children in administrative proceedings.’” (citations omitted)).

21. *Id.*

22. *Id.*

23. *Winkelman*, 127 S. Ct. at 2005.

IDEA.<sup>24</sup> The Court did not reach the latter issue because it found that parents are real parties of interest in IDEA actions and, accordingly, that they are able to litigate their own claims *pro se*.<sup>25</sup>

The Court justified its holding with statutory analysis, an interpretation of legislative intent, and policy considerations. After reviewing the relevant provisions of IDEA, Justice Kennedy used what the Winkelmanns termed “a comprehensive reading” to conclude that “IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents.”<sup>26</sup> The Court catalogued several of IDEA’s references to parental involvement, including a provision allowing parents to serve as members of the IEP team,<sup>27</sup> as well as provisions calling for “procedural safeguards [to] protect the informed involvement of parents.”<sup>28</sup> The Court reasoned that because “parents enjoy enforceable rights at the administrative stage . . . it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.”<sup>29</sup> The Court cautioned that “the statute prevent[ed] [it] from placing too much weight on the implications to be drawn” from the absence of an express conferral of substantive parental rights given that “other entitlements are accorded in less clear language.”<sup>30</sup> With this justification, Justice Kennedy effectively dismissed Justice Scalia’s dissenting argument that the true inconsistency would lie in the IDEA delineating procedural rights for parents while merely implying that they have substantive rights.<sup>31</sup>

The Court supplemented its interpretation of the statute with a note on congressional intent and several policy arguments.<sup>32</sup>

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24. *See id.* at 1998.

25. *Id.* at 2006–07.

26. *See id.* at 1999, 2004.

27. *Id.* at 2000.

28. *Id.* Justice Kennedy further emphasized two provisions of the Act providing for cost recovery by parents. *Id.* at 2001–02 (permitting a state agency “to reimburse the parents [of a child with a disability] for the cost of [private school] enrollment” and allowing attorney’s fees to be awarded “to a prevailing party who is the parent of a child with a disability.” (citation omitted)).

29. *Id.* at 2002.

30. *Id.* at 2003.

31. *See id.*

32. *Winkelmann*, 127 S. Ct. at 2005–06. The Court also rejected the school district’s argument that under *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), statutes like the IDEA passed pursuant to the Spending Clause must provide clear notice before burdening the state with obligations or liabilities. *Id.* at 2006. The Court found that “[r]espondent’s reliance on *Arlington* is mis-

Justice Kennedy maintained that because IDEA mandates a FAPE be provided “at no cost to parents,” Congress did not intend to require parents to hire a lawyer.<sup>33</sup> The Court further emphasized “that ‘the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents.’”<sup>34</sup> The *Winkelman* decision, it claimed, would support parents’ own “legal interest in the education and upbringing of their child.”<sup>35</sup>

Concurring in part and dissenting in part, Justice Scalia agreed with the majority that parents may “seek reimbursement for private school expenses or redress for violations of their own procedural rights” on a *pro se* basis under the IDEA.<sup>36</sup> He disagreed, however, that parents may “challenge the substantive adequacy of their child’s FAPE” and asserted that “parents have no right in the education itself.”<sup>37</sup> Accordingly, Justice Scalia concluded that non-attorney parents do not have a right to proceed *pro se* in seeking a determination of substantive rights, including that the IEP for their child is substantively inadequate.<sup>38</sup>

Justice Scalia’s argument relied on “the interaction between the IDEA and the general *pro se* provision in the Judiciary Act of 1789.”<sup>39</sup> The Judiciary Act<sup>40</sup> specifies that parties in a federal court proceeding may “plead and conduct their own cases personally.”<sup>41</sup> Justice Scalia interpreted this phrase to mean that a parent may bring a civil action *pro se* only if he or she is a “party aggrieved” under IDEA.<sup>42</sup> Justice Scalia then found that IDEA granted two types of rights to parents: rights of reimbursement

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placed” because “[o]ur determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe.” *Id.*

33. *Winkelman*, 127 S. Ct. at 2005 (citing 20 U.S.C. § 1400(d)(1)(B)).

34. *Id.* at 2006–07 (quoting 20 U.S.C. § 1400(c)(5)).

35. *Id.* at 2003.

36. *Id.* at 2007 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia was joined by Justice Thomas.

37. *See id.* at 2008. Whereas Justice Scalia differentiated between procedural and substantive rights in the IDEA, the majority found the procedural rights in the statute to be “intertwined with the substantive adequacy of the education.” *See id.* at 2004 (majority opinion).

38. *See id.* at 2010–11 (Scalia, J., concurring in the judgment in part and dissenting in part).

39. *Id.* at 2007.

40. 28 U.S.C. § 1654 (2000).

41. *Id.*

42. *Winkelman*, 127 S. Ct. at 2007 (Scalia, J., concurring in the judgment in part and dissenting in part) (citing 28 U.S.C. § 1654).

for school expenditures and certain procedural rights.<sup>43</sup> He did not, however, locate any language giving parents the right to a FAPE for their children.<sup>44</sup> Thus, according to Justice Scalia, by “concluding that parents may proceed *pro se* . . . when they challenge the substantive adequacy of their child’s FAPE—so that parents may act without a lawyer *in every IDEA case*”—the majority “sweeps more broadly than the text allows.”<sup>45</sup>

In the final paragraphs of his opinion, Justice Scalia supplemented his analysis of the text of IDEA with several arguments against the Court’s provision of substantive rights to parents. He also defended the logic of Congress’s differentiation between procedural and substantive parental rights based on the relative risks of prosecuting each *pro se*. Justice Scalia first argued that parents would not be left without a remedy under his analysis, because parents would still be able to bring suit to address their child’s inadequate FAPE if represented by counsel.<sup>46</sup> Justice Scalia next argued that it is sensible to follow the congressional limitation of suits to parties aggrieved; parents should be represented in making substantive claims because “*pro se* complaints are prosecuted essentially for free, without screening by knowledgeable attorneys” and “are much more likely to be unmeritorious.”<sup>47</sup> Procedural claims like those for reimbursement, on the other hand, are less likely to be frivolous “since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate.”<sup>48</sup>

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43. See *id.* at 2007–08 (finding that parents may be part of IEP team and file administrative due process complaints).

44. See *id.* at 2008.

45. *Id.* (noting that the majority “cannot identify even a single provision stating that parents have the substantive right to a FAPE”). Justice Scalia later reasoned that if the IDEA does not differentiate between parents’ and children’s rights, as the majority concludes, “the Court could have spared us its painful effort to craft a distinctive parental right out of scattered procedural provisions.” *Id.* at 2010.

46. *Id.* at 2010–11 (responding to the Court’s claim that a “bifurcated regime” like the one Justice Scalia proposed “leaves some parents without a remedy”); see also *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998) (“We note too that Congress obviously contemplated that some parents of disabled children who were successful in their civil appeals would be unable to pay their lawyer’s fees, as evidenced by the fact that Congress included provisions for attorneys’ fees in the IDEA.”).

47. *Winkelman*, 127 S. Ct. at 2011 (Scalia, J., concurring in the judgment in part and dissenting in part).

48. *Id.*

In light of the common-law rule prohibiting non-attorneys from litigating the interests of another, the determination of whether a parent is a “party aggrieved” under IDEA is especially important. A so-called “comprehensive view,” like that employed by the majority, is inadequate.<sup>49</sup> A closer examination of relevant common law principles reveals that by neglecting to parse clearly children’s substantive rights from those of their parents, the majority failed to reckon with the justifiable restrictions placed on *pro se* representation of another person. Although the majority opinion did not purport to allow such representation by interpreting substantive rights under IDEA to belong to both parent and child, *Winkelman* nevertheless effectively allows parents to litigate interests belonging to their children. As a result, the *Winkelman* decision runs afoul of many of the policies underlying the common law rule prohibiting non-attorneys from litigating the interests of another.

The right to self-representation articulated in the Judiciary Act derives from the “right of access to the courts, a strongly held notion” dating back to early English common law.<sup>50</sup> In thirteenth-century England, for instance, the public’s concern that

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49. *See id.* at 2007. Justice Scalia’s opinion paid more careful attention to the text of the IDEA than did the majority opinion. This was particularly evident in Justice Scalia’s argument that under the IDEA a parent is a “party aggrieved” only with respect to reimbursement or procedural violations. *Id.* Several additional principles confirm and augment Justice Scalia’s reading. The canon of *expressio unius est exclusio alterius* holds that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). As the school district’s brief contended, by articulating the right to non-attorney representation in administrative hearings and omitting it from the provision governing civil actions, Congress provided “a quintessential opportunity for the application of the canon of *expressio unius*.” Brief for the Respondent at 13–14, *Winkelman*, 127 S. Ct. 1994 (No. 05-983). The reading employed by the majority, moreover, may be likened to Justice Frankfurter’s “subtle business,” where “meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute.” *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939). Justice Frankfurter’s principle warns against the majority’s logic, under which the IDEA’s distinctions between procedural and substantive rights, and between parent and child, are ignored. *See, e.g.*, 20 U.S.C. § 1415(a) (2000) (providing that states must “ensure that children with disabilities and their parents are guaranteed procedural safeguards” (emphasis added)); 20 U.S.C. § 1406(b) (2000) (labeling certain rights as substantive but referring only to children).

50. *Iannaccone v. Law*, 142 F.3d 553, 557 (2d. Cir. 1998). This right of access is particularly important for “civil litigants unable to afford counsel [who] cannot ordinarily obtain appointment of counsel.” *Id.* at 556.

lawyers were monopolizing the courthouse forced the King to decree that litigants could plead cases on their own.<sup>51</sup> Colonial Americans also harbored distrust for lawyers, inspiring the Massachusetts Body of Liberties to declare in 1641 that all litigants could proceed *pro se*, and thereby avoid paying for counsel.<sup>52</sup> Similar suspicions, coupled with a strong belief in self-reliance, undergirded the Framers' belief that "self-representation in civil suits was a basic right that belongs to a free people."<sup>53</sup>

The common-law rule that a non-attorney may not represent another person in court, however, militates against exercising the right to self-representation.<sup>54</sup> This rule also traces its roots to English common law, where "[t]he practice [of law] was generally controlled by the crown for the public good," and "[t]he Courts were given the particular responsibility of qualifying lawyers who practice before them on the basis of training and character."<sup>55</sup> A similar qualification requirement was common in the United States during the Founding era; eventually, this evolved into a general understanding that "laymen did not practice law."<sup>56</sup> Two primary policies underlie this rule. The first is the states' interest in regulating the practice of law.<sup>57</sup> When another person's interests are at stake, requiring repre-

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51. See Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1325 (1966).

52. See *Iannaccone*, 142 F.3d at 557. Distrust of lawyers has been said to have motivated an increase in *pro se* litigation in recent years. See Nina Ingwer Van Wormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 991 (2007) ("While the increasing cost of legal representation is often cited as the most significant factor in choosing to proceed *pro se*, a host of psychological and social reasons have also been identified as contributing to the trend. For instance, many people harbor a mistrust of the legal system or lawyers in general.").

53. *Iannaccone*, 142 F.3d at 556.

54. See Michael Hatfield, *Pro se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 344–46 (2007) ("The prohibition against the unauthorized practice of law . . . prohibits the unauthorized practice of law by non-lawyers . . . . The right to proceed *pro se* is a personal right and can only be exercised by the person having the right."); see also *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998) ("The rule that a non-lawyer may not represent another person in court is a venerable common law rule" based on the strong state interest in regulating the practice of law).

55. *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 473 (S.D. Ala. 1975).

56. *Id.* at 473–74 (further noting that "[t]his Court cannot find even a suggestion in the history of the Common Law after its primeval inception or in the history of the American lawyer that the word 'counsel' . . . was meant to include a layman off the street").

57. See *Collinsgru*, 161 F.3d at 231.

sentation by a certified attorney “protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims.”<sup>58</sup> Thus, the common-law rule promotes principles of federalism by deferring to the state interest in ensuring some level of competence among those advocating on behalf of another.<sup>59</sup> The second policy underlying this rule recognizes the importance of the rights affected by all legal decisions.<sup>60</sup> The requirement that lawyers be legally educated and subject to ethical restraints and professional discipline fosters greater confidence in their ability to be zealous advocates and avoid mistakes that may diminish or defeat the rights of their clients.<sup>61</sup> This framework motivated the common-law rule implicated in *Winkelman* that non-lawyer parents may not represent their children’s interests in federal court.<sup>62</sup>

In addition to the common law policies described above, there are additional policies implicated when parents represent their children *pro se*. First, children have long been regarded as wards of the court deserving of the court’s special protection.<sup>63</sup> Presumably, such special protection includes promoting a child’s best interests and assuring that a parent does not compromise the child’s legal case because of inexperience with the law and the courts.<sup>64</sup> Several courts have cited specific circumstances in which a parent’s representation might have com-

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58. *Id.*

59. See *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005).

60. See *Collinsgru*, 161 F.3d at 231.

61. See *id.*; see also *Guajardo v. Luna*, 432 F.2d 1324, 1375 (5th Cir. 1970) (“An ordered society has a valid interest in limiting legal representation to licensed attorneys . . . Moreover, prohibiting laymen from representing other persons in court allows courts to impose upon lawyers the responsibility incident to the professional spirit and appropriate to those who are ‘officers of the court.’”); *Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 882–83 (3d Cir. 1991) (finding that a parent representing his daughters in a tort suit was responsible for the district court’s failure to instruct the jury on the proper statute of limitations, and holding that children may not be represented by their parents in federal court proceedings).

62. See, e.g., *Osei-Afriyie*, 937 F.2d at 883; *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581–82 (11th Cir. 1997); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990).

63. See *Richardson v. Tyson*, 86 N.W. 250, 251 (Wis. 1901) (“[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him.”).

64. See *Devine*, 121 F.3d at 582 (“[W]e are compelled to follow the usual rule—that parents who are not attorneys may not bring a *pro se* action on their child’s behalf—because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.”).

promised a child's case.<sup>65</sup> Courts emphasize the protection of children's interests, moreover, because children have virtually no choice in electing to have their parents represent them.<sup>66</sup> Although the interests of parents and children may align more often than those of most litigants, the court in *Cheung v. Youth Orchestra Foundation* rejected the notion that non-attorney parent representation may in fact afford acceptable protection for a child's interests: "[s]ole shareholders of corporations are not allowed to represent such corporations . . . [.]a circumstance in which the identity of the litigant and the *pro se* attorney is closer than [in the parent-child relationship]."<sup>67</sup>

Notably, no court of appeals has found IDEA cases exempt from the common law rule preventing non-attorney parents from representing a minor child.<sup>68</sup> Further, Congress enacted IDEA against a background of legislative principles, including the rule that "to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common

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65. See *id.* at 582 n.19 ("[W]e note that the school board in this case moved the district court to dismiss the Devines' action on abstention grounds. The Devines, through counsel, responded and succeeded in avoiding dismissal. A non-lawyer parent, though perhaps the most competent person to present evidence relevant to his/her child's disability at a due process hearing, would be ill-equipped to contest a motion based on such a difficult issue."); see also *Osei-Afriyie*, 937 F.2d at 882 ("As far as we can glean from the record, Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard . . . [H]e did not ask the district court for a jury instruction on tolling due to infancy, nor did he object to the absence of such an instruction. Not having been made aware of [the tolling statute], the jury found that all of the children's claims were time-barred.")

66. See *Osei-Afriyie*, 937 F.2d at 882 ("The choice to appear *pro se* is not a true choice for minors who under state law . . . cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect . . ." (citation omitted)).

67. *Cheung*, 906 F.2d at 61.

68. The Second, Third, Sixth, Seventh, and Eleventh Circuits all held, prior to *Winkelman*, that parents lack substantive rights under the IDEA, and that non-lawyer parents are not entitled to represent their children in court. See *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005); *Navin v. Park Ridge Sch. Dist.* 64, 270 F.3d 1147, 1149 (7th Cir. 2001); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 227 (3d Cir. 1998); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-25 (2d Cir. 1998) (per curiam); *Devine*, 121 F.3d at 582. The courts of appeals that have allowed parents to proceed *pro se* have found that the IDEA endows parents with substantive rights. See *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 250 (1st Cir. 2003) ("For the reasons that follow, we conclude that parents are 'parties aggrieved' within the meaning of IDEA and thus may sue *pro se.*" (citation omitted)); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 383 (4th Cir. 2000) (treating parents as "parties aggrieved" within the meaning of the IDEA).

law.”<sup>69</sup> Thus, Congress would have needed to be clear about rejecting the common-law rule prohibiting non-attorney representation of others if it had intended IDEA to do so.

Granted, the Court did not *need* to probe these common law considerations, as it had already found a substantive right for parents in the text of the IDEA.<sup>70</sup> Such considerations, however, were at the heart of the Winkelmans’ case. As one scholar recently contended, the Court “essentially ignored what appeared to have been the primary focus of *Winkelman*, namely whether parents who are not attorneys can represent their children in legal actions pursuant to the IDEA . . . perhaps to the detriment of children.”<sup>71</sup>

In addition to stating erroneously that parents have “independent, enforceable rights” to a FAPE,<sup>72</sup> the Court conflated the substantive rights of the parent with those of the child. For instance, the Court found that “IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents,” indicating that a parent making a substantive claim to a FAPE is simultaneously making claims on her child’s behalf and her own.<sup>73</sup> In distinguishing *Arlington Central School District Board of Education v. Murphy*, the Court further indicated that “[a] determination by the Court that some distinct class of people has independent, enforceable rights might result in a change to the States’ statutory obligations. But that is not the case here.”<sup>74</sup> Thus, the Court explicitly stated that *Winkelman* does not hold that a “distinct class of people” has independent rights under IDEA; on this view, parents and their children have the same substantive rights.<sup>75</sup> This conclusion was echoed by the dissent in *Collinsgru v. Palmyra Board of Education*, which maintained that parents have a right to a FAPE that they may prosecute *pro se*: “They are the rights of both the parents and the children, and they are overlapping and insepa-

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69. *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted).

70. See *Winkelman*, 127 S. Ct. at 2006–07.

71. Russo, *supra* note 5, at 14.

72. *Winkelman*, 127 S. Ct. at 2006.

73. See *id.* at 2004.

74. *Id.* at 2006.

75. See *id.*; see also *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 263 (4th Cir. 1998) (reiterating the importance of children’s rights to a FAPE and finding that IDEA’s “references to parents are best understood as accommodations to the fact of the child’s incapacity” but that incapacity should not “collapse the identity of the child into that of his parents”).

rable. In enforcing their own rights under the Act, parents are also acting on behalf of their child."<sup>76</sup>

Accordingly, under *Winkelman* a parent, by representing her own interest in a FAPE, is also representing her child's interest in a FAPE. As Professor Charles J. Russo has explained, *Winkelman* left unclear what would happen if students (particularly older students) disagreed with their parents about their IEP.<sup>77</sup> Under the Court's opinion, it is uncertain whether the parent and the child would be able to litigate substantive FAPE claims separately. This crucial uncertainty belies the Court's assertion that parents have "independent" rights.<sup>78</sup> Indeed, concluding that a parent's substantive rights are divorced from those of their child defies logic because "parents have no rights under the IDEA if they do not have a disabled child seeking an education."<sup>79</sup>

As the foregoing common-law analysis indicates, allowing parents to litigate FAPE claims *pro se* raises many worrisome policy implications. Even accepting the majority's conclusion that parents also have a right to a FAPE, *Winkelman* compromises the states' ability to regulate the practice of law by allowing a parent to represent her own, and consequently her child's, interest in FAPE without counsel.<sup>80</sup> In practice, *Winkelman* might also compromise a child's right to a FAPE when an appeal fails because of a parent's lack of legal knowledge and experience.<sup>81</sup> Even in *Maroni v. Pemi-Baker Regional School District*—the sole decision cited by the *Winkelman* majority for the proposition that parents have substantive rights to a FAPE<sup>82</sup>—the court noted that "recognizing parents as 'aggrieved parties'"

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76. 161 F.3d 225, 240 (3d Cir. 1998) (Roth, J., concurring in part and dissenting in part).

77. Russo, *supra* note 5, at 14–15 (further noting that this situation is "[r]eminiscent of Justice Douglas' partial dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972), wherein he feared that children could have been 'harnessed' to the lifestyles of their parents without opportunities to express their own desires [and that] the status of the putative rights of students over the content of their IEPs apart from the wishes of their parents is uncertain").

78. See *Winkelman*, 127 S. Ct. at 2005. In addition, the Court neglected to address the situation where a parent desires to relitigate his or her case with the help of an attorney claiming incompetent legal advice. See Russo, *supra* note 5, at 16.

79. See *Collinsgru*, 161 F.3d at 236.

80. See *Winkelman*, 127 S. Ct. at 2011.

81. See Cheung v. Youth Orchestra Found., 906 F.2d 59, 61 (2d Cir. 1990) ("[I]t is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.")

82. See *Winkelman*, 127 S. Ct. at 1999.

is problematic because “[c]hildren whose interests are advanced by parents who sue pro se may not have the best advocates. Parents may be emotionally involved and not exercise rational and independent judgment.”<sup>83</sup>

Instead of engaging in detailed textual analysis of IDEA, the Court in *Winkelman* used a mosaic-like analysis<sup>84</sup> to reach the curious conclusion that parents have a substantive right to a FAPE under IDEA.<sup>85</sup> This analysis led the Court to skirt the broader question of non-lawyer representation of children’s interests. As a consequence, the outcome in *Winkelman* enables parents to represent their children’s substantive interests *pro se*—a result contrary to established common-law principles and public policy considerations.

*Logan Steiner*

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83. *Maroni*, 346 F.3d at 258 (emphasis added). Here the court in *Maroni* assumes that parents suing as aggrieved parties with regard to FAPE claims are simultaneously representing the interests of their children. *Id.* at 257. The majority in *Winkelman* failed to explore this possibility.

84. See *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939).

85. See *Winkelman*, 127 S. Ct. at 2008 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding that “[t]he right to a free appropriate education obviously inheres in the child, for it is he who receives the education,” and arguing that this fact explained why “the Court cannot identify even a single provision stating that parents have the substantive right to a FAPE”).



AVOIDING MEAD: THE PROBLEM WITH UNANIMITY IN  
*Long Island Care at Home, Ltd. v. Coke*,  
127 S. Ct. 2339 (2007)

One of the central questions in administrative law is the appropriate level of deference courts should give to agency interpretations of statutorily conferred authority. The Supreme Court announced its most recent major doctrinal development in this area in *United States v. Mead Corp.*,<sup>1</sup> a 2001 opinion in which the Court held that an “administrative implementation of a particular statutory provision” was entitled to deference if the agency was self-consciously exercising congressionally delegated authority to “make rules carrying the force of law.”<sup>2</sup> In redefining the boundaries of the well-established *Chevron*<sup>3</sup> doctrine, *Mead* soon became the subject of significant confusion and academic discussion,<sup>4</sup> but the Court has not clarified its holding in the seven years since announcing the decision. Last term, in *Long Island Care at Home, Ltd. v. Coke*,<sup>5</sup> the Court gave deference to a Department of Labor decision to exempt “companionship services” employees from minimum wage and overtime compensation benefits.<sup>6</sup> At first glance, *Long Island Care* seems to be a straightforward and inconsequential opinion that invokes *Mead* to reach its disposition. In examining the opinion’s reasoning, however, it is evident that the Court avoided a full discussion of *Mead* for the sake of unanimity, thus making *Long Island Care* a notable example of Chief Justice

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1. 533 U.S. 218 (2001).

2. *Id.* at 226–27.

3. *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

4. *See, e.g.*, Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1447 (2005) (asserting that *Mead* has confused lower courts and “has complicated judicial review of agency action”); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1248 (2007) (stating that *Mead* “suffers from its own lack of clarity”); William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719–20 (2002) (noting that *Mead* has contributed to “chaos” by helping to create “a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

5. 127 S. Ct. 2339 (2007).

6. *Id.* at 2339–40.

Roberts's announced preference for narrow and unanimous opinions. More importantly, *Long Island Care* demonstrates that narrowing an opinion for the sake of unanimity is undesirable when it delays much needed doctrinal clarification and development.

In 1913, President William Howard Taft signed a bill authorizing the creation of the Department of Labor, which was designed in part "to foster, promote, and develop the welfare of the wage earners of the United States."<sup>7</sup> Twenty-five years later, Congress enacted the Fair Labor Standards Act, which created the Wage and Hour Division within the Department of Labor and codified worker protections such as minimum wage and overtime pay.<sup>8</sup> In 1974, as part of a lengthy series of amendments designed to increase the scope of wage protections,<sup>9</sup> Congress brought most domestic service employees under the umbrella of the Act, but exempted workers who provide "companionship services" to individuals who cannot care for themselves.<sup>10</sup> Congress left the scope of this exemption ambiguous, indicating that the Department of Labor should define "domestic service employment" and "companionship services" through the promulgation of regulations.<sup>11</sup>

The Department responded to this congressional mandate by issuing a series of regulations the following year. The agency defined "companionship services" as "services which provide fellowship, care, and protection for a person who . . . cannot care for his or her own needs."<sup>12</sup> In addition, the Department issued a "General Regulation" defining "domestic service employment" to include "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed."<sup>13</sup> Concurrently, in a regulation seemingly inconsistent with the General Regulation,

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7. An Act To Create a Department of Labor, Pub. L. No. 62-426, 37 Stat. 736 (1913).

8. 29 U.S.C. § 201 (1938).

9. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (noting that the amendments were passed to "expand the coverage" of the Fair Labor Standards Act).

10. *Id.* § 7(b)(3), 88 Stat. at 62 (codified as 29 U.S.C. § 213(a)(15)).

11. *See id.*

12. 29 C.F.R. § 552.6 (1975).

13. *Id.* § 552.3 (noting that "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs" all fall within the category of "domestic service employment").

the Department determined that workers who provide domestic services while employed by third parties are exempt from the pay protections of the Fair Labor Standards Act.<sup>14</sup> Justice Breyer later dubbed this the “third-party regulation.”<sup>15</sup>

In April 2002, Evelyn Coke brought a lawsuit in the United States District Court for the Eastern District of New York against her former employer, Long Island Care at Home, Ltd., challenging these Department of Labor regulations.<sup>16</sup> Coke sought compensation for overtime and minimum wage pay she had been denied while working for several years as a “home healthcare attendant” for Long Island Care.<sup>17</sup> The District Court granted Long Island Care’s motion for judgment on the pleadings and upheld both of the contested regulations.<sup>18</sup>

The Second Circuit affirmed in part and vacated in part, giving *Chevron* deference to the General Regulation and striking down the third-party regulation.<sup>19</sup> According to the Second Circuit, the third-party regulation was an “interpretive regulation”<sup>20</sup> that had not been promulgated as a conscious exercise of explicitly granted congressional authority, thus precluding *Chevron* deference on review and warranting less deferential *Skidmore* review.<sup>21</sup> Under this lower standard, the Second Circuit rejected the agency’s rationale supporting its third-party regulation, holding instead that the regulation was “inconsistent with Congress’s likely purpose in enacting the 1974 amendments.”<sup>22</sup>

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14. 29 C.F.R. § 552.109(a) (1975).

15. Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2345 (2007).

16. Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 121–22 (2d Cir. 2004), *rev’d*, 127 S. Ct. 2339 (2007). Coke specifically challenged 29 C.F.R. § 552.6 (the General Regulation) and 29 C.F.R. § 552.109(a) (the third-party regulation). *Id.* at 121–22.

17. *Id.* at 122.

18. Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332, 333 (E.D.N.Y. 2003).

19. Coke, 376 F.3d at 118, 121–22, 131–32.

20. *Id.* at 131–32 (classifying the third-party regulation as an “interpretive rather than a legislative regulation,” in part because the Department of Labor included the regulation under a subpart labeled “Interpretations”).

21. *Id.* at 132 (“*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless ‘it appears that the agency interpretation claiming deference was promulgated in exercise of that authority.’”) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)); *see also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (noting that administrative interpretations “constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance” such that they should be considered by a reviewing court and can be adopted if they are persuasive).

22. Coke, 376 F.3d at 133.

The Supreme Court granted certiorari,<sup>23</sup> but vacated and remanded the case before oral argument to give the Second Circuit an opportunity to reconsider its decision in light of a recently published Department of Labor "Wage and Hour Advisory Memorandum."<sup>24</sup> Although the Department had considered modifying the third-party regulation in the past,<sup>25</sup> the agency indicated in the Advisory Memorandum that it considered the third-party regulation legally binding.<sup>26</sup> The Second Circuit found this memorandum unpersuasive and again decided to strike down the third-party regulation,<sup>27</sup> after which the Supreme Court granted certiorari for the second time.<sup>28</sup>

Justice Breyer, writing for a unanimous Court, authored an opinion reversing the Second Circuit's decision and holding that the Department of Labor's third-party regulation was entitled to *Chevron* deference.<sup>29</sup> The Court acknowledged that the General Regulation conflicted with the third-party regulation but deferred to the agency's stated position in the Advisory Memorandum that the third-party regulation governed, even though this memorandum was written as a result of Coke's lawsuit.<sup>30</sup> The Court noted functional reasons for adopting this deferential stance, including the potential impact on other groups of employees, but also cited its longstanding practice of deferring to agency interpretations of their own regulations.<sup>31</sup>

The Court disagreed with the Second Circuit's finding that the third-party regulation was an interpretive regulation underserving of deference.<sup>32</sup> The agency's treatment of the regulation as binding seemed more persuasive to the Court than the categorical question of whether it was an interpretive or legislative regulation.<sup>33</sup> The Court reasoned that the regulation was bind-

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23. *Long Island Care at Home, Ltd. v. Coke*, 545 U.S. 1103 (2005).

24. *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006).

25. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345 (2007).

26. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 51 (2d Cir. 2006).

27. *Id.* at 51.

28. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 853 (2007).

29. *Long Island Care at Home*, 127 S. Ct. at 2344, 2349–52.

30. *Id.* at 2348–49.

31. *Id.*

32. *Id.* at 2350.

33. It is strange that the Court did not give much weight to this distinction because under *Chevron* only legislative regulations are binding on reviewing courts. *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that "legislative regulations" are controlling "unless they are arbi-

ing because it directly governed “the conduct of members of the public” and because Congress intended the Department of Labor to fill the statutory gap left by the undefined terms in the Fair Labor Standards Act.<sup>34</sup>

The opinion concluded with a discussion of the notice-and-comment procedure undertaken before the adoption of the third-party regulation. Coke had argued that this procedure was defective because the final rule was not a logical outgrowth of the proposed rule.<sup>35</sup> The Second Circuit did not reach this question, but implied in its original opinion that the Department failed to provide a sufficient explanation for departing from its announced intention to enact a third-party regulation that would bring employees of third parties under the wage protections of the Fair Labor Standards Act.<sup>36</sup> The Supreme Court disagreed, however, and found that the Department’s procedure was legally sufficient because it was “reasonably foreseeable” that the final rule would not be the exact codification of the proposed rule.<sup>37</sup>

Although *Long Island Care* was not a high-profile decision, the opinion is notable because of the way it avoided a thorough treatment of the *Mead* doctrine. Justice Breyer approached the analysis from the premise that Congress explicitly left gaps in the Fair Labor Standards Act and delegated the power to fill these gaps to the Department of Labor, concluding that the Department’s third-party regulation “seems to fill a statutory gap.”<sup>38</sup> In framing the issue in this way, Justice Breyer sidestepped a significant finding by the Second Circuit. In its 2004 opinion, the Second Circuit noted that after Congress delegated authority to the Department of Labor to define terms contained in § 213(a)(15) of the Act, the Department indicated that these definitions could be found in a series of four regulations.<sup>39</sup> Notably missing from this list, however, was 29 C.F.R. § 552.109(a), the third-party regulation at issue in Coke’s lawsuit.

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trary, capricious, or manifestly contrary to the statute,” but containing no provision for deference to interpretive regulations).

34. *Long Island Care at Home*, 127 S. Ct. at 2350–51.

35. *Id.* at 2351.

36. *See Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 132 (2004), *rev’d*, 127 S. Ct. 2339 (2007).

37. *See Long Island Care at Home*, 127 S. Ct. at 2351.

38. *Id.* at 2346.

39. The Department of Labor indicated in 29 C.F.R. § 552.2(c) that the regulations in question were 29 C.F.R. §§ 552.3, 552.4, 552.5, and 552.6. *See Coke*, 376 F.3d at 131.

The Second Circuit interpreted this omission as evidence that the Department of Labor “effectively conceded” that this regulation was not “promulgated pursuant to Congress’s express legislative delegation,” and therefore was not entitled to deference under *Mead*, because the second step of the two-step *Mead* analysis was not satisfied.<sup>40</sup>

Justice Breyer’s avoidance of *Mead*’s second step is significant because it allowed him to write an opinion that neither further engaged nor fully endorsed *Mead*. Doing either likely would have cost him Justice Scalia’s vote. Justice Scalia vigorously dissented in *Mead*, an opinion he characterized as an “avulsive change” in administrative law doctrine that was “neither sound in principle nor sustainable in practice.”<sup>41</sup> His blistering dissent—which was longer than the majority opinion—was not the end of the matter. Four years later, Justice Scalia dissented in *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>42</sup> a decision that seemed to entrench further *Mead*’s holding. In *Brand X*, the Court ruled that an administrative agency may ignore a judicial interpretation of a statutory provision so long as the issue has not been addressed by Congress and falls within the scope of the *Chevron* “step two” analysis.<sup>43</sup> In dissent, Justice Scalia forcefully argued against this outcome, and argued that *Mead*’s misguided holding had paved the way for the “bizarre” conclusion that an agency can effectively overrule a judicial determination.<sup>44</sup>

In response, Justice Breyer wrote a concurrence in *Brand X* for the express purpose of pointing out the flaws in Justice Scalia’s

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40. *Coke*, 376 F.3d at 131–32. This reading of *Mead* as requiring a two-step analysis is consistent with the text of the opinion. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”). Many academic commentators agree with this characterization of *Mead*’s holding. See, e.g., Hickman & Krueger, *supra* note 4, at 1249 (noting that a court must “affirmatively find[]” both steps of the inquiry); Jordan, *supra* note 4, at 725–26 (noting that *Mead* requires an agency to show first that it was delegated authority to act and second that it acted under the guise of that authority); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002) (describing *Mead* as a “two part inquiry”).

41. *Mead*, 533 U.S. at 239–41 (Scalia, J., dissenting).

42. 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting).

43. *Id.* at 982–84 (majority opinion).

44. *Id.* at 1015–17 (Scalia, J., dissenting).

interpretation of *Mead*.<sup>45</sup> This direct reply was not surprising, as Justices Breyer and Scalia have often stood on opposite sides of questions involving the application of *Chevron* deference, which is the key aspect of *Mead*. Professor Cass Sunstein has argued that this issue “has become the central location of an intense and longstanding disagreement” between the two Justices.<sup>46</sup> Given their divergence on the question of the degree of deference that should be properly accorded to agencies, it is curious that Justice Scalia joined Justice Breyer’s opinion in *Long Island Care*.<sup>47</sup> Whereas Justice Scalia cannot be expected to dissent from each opinion upholding a precedent with which he has taken issue in the past, the *Mead* fight does not appear to be over, and it seems unlikely that Justice Scalia would have joined an opinion that thoroughly engaged the *Mead* doctrine.

*Mead* seems unsettled in part because it has been the subject of lower court confusion and academic criticism since it was decided.<sup>48</sup> In addition, the voting patterns in *Brand X* seem to suggest that support for *Mead* may not be fully entrenched, or at least that the Justices may harbor different interpretations of its holding. In *Brand X*, four years after the Court voted 8-1 against Justice Scalia in *Mead*, the majority opinion did not fully address Justice Scalia’s dissenting arguments about *Mead*’s breadth. In addition, none of the other Justices joined Justice Breyer’s *Brand X* concurrence attacking Justice Scalia’s charac-

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45. *Id.* at 1003 (Breyer, J., concurring) (“I write separately because I believe it important to point out that Justice Scalia, in my view, has wrongly characterized the Court’s opinion in *United States v. Mead Corp.*”). Professor Lisa Bressman has argued that Justice Breyer’s concurring opinion “acknowledges the confusion that *Mead* has wrought” without providing any “additional guidance.” Bressman, *supra* note 4, at 1448.

46. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006).

47. One year before *Mead* was decided, Justices Scalia and Breyer argued in concurring and dissenting opinions about the appropriate scope of *Skidmore* deference. See *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 596 (Breyer, J., dissenting).

48. See, e.g., Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (describing how difficult it has been for the D.C. Circuit to wrestle with the application of *Mead*, and suggesting that the doctrine may be a “failed experiment” in need of reversal); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 290–91 (2001) (concluding that the first six months of lower court decisions applying the *Mead* standard led to confusion as well as an erosion of the *Chevron*-era judicial deference to agency authority); see also Bressman, *supra* note 4.

terization of *Mead*.<sup>49</sup> Finally, Justice Souter, who authored the majority opinion in *Mead*, actually joined Part I of Justice Scalia's *Brand X* dissent, perhaps signaling his discomfort with *Mead*'s potential implications.<sup>50</sup>

Given these uncertainties about the doctrine and Justice Scalia's aggressive attacks on *Mead*, it seems unlikely that Justice Scalia would have joined the *Long Island Care* opinion if it had engaged in an extended discussion of *Mead*. But in avoiding a full-scale *Mead* analysis, Justice Breyer managed to write for a unanimous Court.<sup>51</sup>

Although the *Long Island Care* outcome will likely have significant repercussions for the home care industry,<sup>52</sup> the decision received very little attention in the media, and has been the subject of virtually no academic discussion since its issu-

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49. *Id.* at 1003.

50. Part I of Justice Scalia's dissent did not address *Mead*, arguing against the majority's holding in *Brand X* on other grounds. It is nonetheless surprising that Justice Souter associated himself with the first part of a dissenting opinion which, in the second part, forcefully condemned the opinion he had written in *Mead*. See 545 U.S. 967, 1005 (Scalia, J., dissenting). It is difficult to gauge the degree of support *Mead* now commands among the Justices, as Chief Justice Roberts and Justice Alito have not expressed their views on the decision since joining the Court. During his tenure on the Third Circuit, Justice Alito cited *Mead* several times, but never in a way that revealed his opinion about the breadth or soundness of the decision. See *Soltane v. U.S. Dep't of Justice and Naturalization Serv.*, 381 F.3d 143, 148 n.4 (3d. Cir. 2004) (citing *Mead* once); *Chen v. Ashcroft*, 381 F.3d 221, 224, 232 n.18 (3d. Cir. 2004) (citing *Mead* twice); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 299 (3d. Cir. 2004) (citing *Mead* twice); *Thomas v. Comm'r of Soc. Sec.*, 294 F.3d 568, 573-74 (3d. Cir. 2002) (citing *Mead* three times), *rev'd*, 540 U.S. 20 (2003).

51. Professor Elizabeth Foote seems to agree that Justice Breyer did not base his *Long Island Care* opinion on *Mead*, noting that the Court's holding "is highly reminiscent of the approach that was taken by the Court in pre-*Chevron* cases." Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 721 (2007).

52. See Brief for Nat'l Ass'n for Home Care & Hospice, Inc. as Amicus Curiae Supporting Petitioners, *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (pointing out that "approximately 2.8 million Medicare beneficiaries received home health services" in 2005, and arguing that bringing the workers who care for these beneficiaries under the protections of the Fair Labor Standards Act would "discriminate against the elderly and infirm" by increasing the cost of Medicare). *But see* Brief for AARP, et al. as Amici Curiae Supporting Respondents, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (noting the shortage of home health care workers and arguing that denying wage protections to these workers will "cause severe disruptions" in the home health care industry by further discouraging this type of employment).

ance last year.<sup>53</sup> Perhaps it was this relative obscurity that made *Long Island Care* a prime opportunity for the nine Justices to speak with one voice. The decision conforms with the model of unanimity that Chief Justice Roberts has embraced.<sup>54</sup> Since his elevation to the Court in 2005, Chief Justice Roberts has made no secret of his goal of encouraging the issuance of unanimous opinions.<sup>55</sup> Reaching such consensus with nine Justices is not easy, but Chief Justice Roberts has indicated that one way to achieve greater unanimity is to craft very narrow holdings.<sup>56</sup> According to the Chief Justice, increased unanimity

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53. For a cursory explanation of the holding, see Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006–2007 Terms of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 143–45 (2007) (briefly outlining the holding in *Long Island Care* with no discussion or analysis). Two other commentators have mentioned that *Long Island Care* was important but failed to state their reasons. See Foote, *supra* note 51, at 677 (asserting that *Long Island Care* is a “key administrative law” decision); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN L. REV. 725, 773 n. 383 (2007) (noting that *Long Island Care* was “important”).

54. That *Long Island Care* seems to be an example of the Court acting in accordance with Chief Justice Roberts’s views on unanimity does not suggest the Court is necessarily moving in the direction of greater consensus. It is true that the Court issued 36 unanimous opinions in the 2005 term, the first with Chief Justice Roberts at the helm, *The Supreme Court Statistics*, 120 HARV. L. REV. 372, 377 (2006), but this number dropped to 21 in the 2006 term, *The Supreme Court Statistics*, 121 HARV. L. REV. 436, 441 (2007). Some commentators have suggested that the brief honeymoon period the new Chief Justice enjoyed in 2005 has largely evaporated, and that one possible reason for the spike in unanimity during the 2005 term is that the Court was waiting for Justice O’Connor’s replacement to arrive before deciding many controversial cases. See Andrew Seigel, *A Tale of 2 Terms: A Transitional Year for the United States Supreme Court*, S. CAROLINA LAWYER, Sept. 2006, at 30. This theory suggests that unanimity will not become a fixture of the Roberts Court. The Chief Justice, however, seems to have a more optimistic view: “We had more unanimous opinions announced in a row than ever before. There’s some limitation on this statistic—in the modern Court, or in the modern era—but in the first 5-4 decision, people are writing, ‘So much for unanimity.’” JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 225–26 (2006).

55. ROSEN, *supra* note 54, at 224–28; James Taranto, *Getting to Yes*, WALL ST. J., July 1, 2006, at A11. Even in his Senate Confirmation Hearings, then-Judge Roberts indicated that “bring[ing] about a greater degree of coherence and consensus in the opinions of the Court” was a “top priority.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of John G. Roberts, Jr.), reprinted as *Nomination of John G. Roberts, Jr., of Maryland, to be Chief Justice of the United States*, in 20 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY SENATE JUDICIARY COMMITTEE, 1916–2005, at 371 (Roy M. Mersky & Tobe Liebert, eds., 2006).

56. See ROSEN, *supra* note 54, at 228.

will bring more legitimacy to an increasingly scrutinized Court, because it "'promote[s] clarity and guidance' to lawyers and lower courts."<sup>57</sup>

Chief Justice Roberts is correct that unanimity can send clear signals that leave little ambiguity in the law. The Court demonstrated the merits of this approach with respect to school desegregation in the 1950s and 1960s. *Brown v. Board of Education* spawned an impressive string of at least fifteen years of nearly perfect unanimity on desegregation issues.<sup>58</sup> It was particularly important that the Court spoke with one voice on such a volatile subject to ensure that the States both understood and adhered to the urgency of the constitutional mandate to desegregate.<sup>59</sup> Absent a particularly divisive and pressing issue akin to school desegregation, however, unanimity for the sake of consensus is not a sustainable or beneficial objective if it comes at the price of doctrinal clarity.

*Long Island Care* is an example of a unanimous opinion that does not exemplify the clarity and guidance envisioned by Chief Justice Roberts. In avoiding a discussion of the second prong of the *Mead* analysis in *Long Island Care*, the Court passed over an opportunity to further illuminate the proper application of agency deference under *Mead*. As noted, this is troublesome both because the *Mead* doctrine is confusing and because the current level of support for *Mead* among the Justices is not entirely clear.

Professor Mark Tushnet has observed that "unanimity achieved by compromise" may actually undermine the legitimacy of the Court by leading to vote trading and logrolling,

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57. Taranto, *supra* note 55, at A11 (quoting Chief Justice Roberts).

58. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 43 (1979) (noting that the Court issued unanimous decisions regarding school desegregation from 1954 to 1969). See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Holophane Co. v. United States*, 352 U.S. 903 (1956) (per curiam); *Pennsylvania v. Bd. of Dir. of City Trusts*, 353 U.S. 230 (1957) (per curiam); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Bradley v. Sch. Bd.*, 382 U.S. 103 (1965) (per curiam); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (per curiam).

59. See WOODWARD & ARMSTRONG, *supra* note 58, at 43 (suggesting that the Court ruled unanimously in the desegregation cases because "it was essential to let the South know that not a single Justice believed in anything less than full desegregation"). The appeal of unanimity was so strong that it appears to be one reason that Justice Reed laid aside his reservations to vote with the majority in *Brown*. For a discussion of Justice Reed's complex motivations, see Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y.L. SCH. L. REV. 741 (2004-2005).

thereby producing more confusion than “could emerge from a fractious Court.”<sup>60</sup> Fractured opinions may offer little or no guidance to lower courts, particularly in instances where most or all of the Justices issue separate opinions.<sup>61</sup> The Supreme Court, however, rarely produces such extremely splintered decisions,<sup>62</sup> and should not shy away from opportunities to explore and clarify confusing and uncertain doctrinal issues relevant to the case at hand.<sup>63</sup> Principles of judicial restraint suggest that the Court should use moderation in deciding which issues to explore, but in *Long Island Care*, where the lower court’s opinion largely turned on one step of an ill understood two-step analysis, the Court did a disservice to the lower courts by sidestepping the issue. If the Court did not agree with the Second Circuit’s approach to *Mead* as a two-step test, it should have so held. If the Supreme Court seeks to avoid contentious issues by crafting narrow holdings in individual cases, lower courts may be kept in the dark about confusing doctrines. Thus, when the Supreme Court enables itself to speak with one voice by greatly narrowing the issue presented, it risks preventing lower courts from becoming similarly united by leaving unclear doctrinal issues underdeveloped.<sup>64</sup>

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60. Mark Tushnet, *Symposium Foreword: The First (And Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495, 497–98 (2007).

61. One of the most striking examples of the splintering of opinion among the Justices occurred in 1972, when the Court’s one-paragraph per curiam opinion in *Furman v. Georgia*, 408 U.S. 238, was followed by nine separate opinions totaling a staggering 231 pages.

62. This Author’s review of the 80 decisions issued by the Supreme Court during its 2004 Term (the last full term before Chief Justice Roberts joined the Court) revealed only five instances in which five or more Justices issued separate opinions. An additional seven decisions drew four separate opinions, while the remaining 68 decisions of the term were reported with three or fewer separate opinions. Of course, this empirical snapshot is not evidence of the relative cohesiveness of the Court’s decisions, but the consistency with which the Court issued decisions with three or fewer opinions in the 2004 Term seems to suggest that the Court is infrequently splintered to the point of confusion.

63. This doctrinal fleshing out must be done judiciously to avoid overly broad holdings that could lead to unanticipated consequences. This Comment contends, however, that issuing overly narrow holdings for the sake of unanimity is an unwise approach.

64. Unanimity could also result in the suppression of arguments that might otherwise be contained in a dissent or concurrence. Such opinions can become increasingly valuable over time, as was famously demonstrated by Justice Harlan’s forward-looking dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (arguing that the Constitution forbids government-sanctioned racial discrimination).

Chief Justice Roberts has made it clear that he hopes to help the Court achieve greater clarity in the law by issuing more unanimous opinions and by narrowing the holdings of individual decisions. The Supreme Court's decision making process is by no means transparent, but *Long Island Care* seems to be one example of a case that fits Chief Justice Roberts's mold because its holding was both unanimous and narrow. Although the decision necessarily involved invocation of the *Mead* doctrine, Justice Breyer framed the discussion to avoid fully engaging the relevant two-step analysis, a move that allowed Justice Scalia to join the opinion without retreating from his previous condemnation of *Mead*. In doing so, however, the Supreme Court delayed further development of the unsettled *Mead* doctrine, demonstrating that unanimity is undesirable when it comes at the expense of doctrinal clarification.

*Michael F. Perry*

NO TAXATION WITHOUT SEPARATION: THE SUPREME  
COURT PASSES ON AN OPPORTUNITY TO END  
ESTABLISHMENT CLAUSE EXCEPTIONALISM  
*Hein v. Freedom From Religion Foundation, Inc.*,  
127 S. Ct. 2553 (2007)

The Supreme Court generally denies plaintiffs standing to challenge the constitutionality of government expenditures if their only basis for standing is that they pay taxes.<sup>1</sup> The Court, however, has created one exception: for taxpayers challenging alleged Establishment Clause violations.<sup>2</sup> This Establishment Clause exception has been criticized, challenged, and narrowed by subsequent cases but never overruled.<sup>3</sup> Last Term, the Court passed on yet another opportunity to overturn the maligned taxpayer standing exception. In *Hein v. Freedom From Religion Foundation, Inc.*,<sup>4</sup> a plurality of the Supreme Court held that federal taxpayers lacked standing to challenge conferences and speeches that promoted the Faith-Based and Community Initiatives, a program created by executive order and funded through

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1. See, e.g., *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952) (“[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.” (citations omitted)).

2. Except for the Establishment Clause, taxpayer standing has never been extended to alleged violations of any other constitutional provisions. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2569 (2007) (citing *Tilton v. Richardson*, 403 U.S. 672 (1971) (no taxpayer standing to sue under Free Exercise Clause of First Amendment); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348–49 (2006) (no taxpayer standing to sue under Commerce Clause); *United States v. Richardson*, 418 U.S. 166, 175 (1974) (no taxpayer standing to sue under Statement and Account Clause of Article I); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Article I)).

3. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (criticizing *Flast v. Cohen*, 392 U.S. 83 (1967)—the case that created the Establishment Clause taxpayer standing doctrine—for failing to recognize the separation of powers component of standing doctrine); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (calling the *Flast* holding a “narrow exception . . . to the general rule against taxpayer standing”); *Richardson*, 418 U.S. at 180–81 (Powell, J., concurring) (criticizing *Flast* for, among other things, purporting to separate the question of standing from the merits, but then looking to the merits of the case for standing purposes to determine whether a logical “nexus” exists between the plaintiff’s status and the claim).

4. 127 S. Ct. 2553 (2007).

general executive branch appropriations.<sup>5</sup> Although *Hein* denied the plaintiffs standing, the plurality implicitly accepted and perpetuated the premise of the misguided precedents recognizing taxpayer standing: that the nature of the claim can compensate for a plaintiff's otherwise inadequate standing position.

In 2001, President Bush issued executive orders creating the White House Office of Faith-Based and Community Initiatives and Executive Department Centers for Faith-Based and Community Initiatives within several federal agencies and departments.<sup>6</sup> The White House Office and Executive Department Centers were "'created entirely within the executive branch . . . by Presidential executive order.'"<sup>7</sup> No congressional legislation authorized their creation, and no law specifically appropriated any money for their activities; the White House Office and Executive Department Centers were "funded [entirely] through general Executive Branch appropriations."<sup>8</sup>

Freedom From Religion Foundation, Inc., a corporation "opposed to government endorsement of religion,"<sup>9</sup> and three of its members brought a lawsuit against the directors of the White House Office and Executive Department Centers.<sup>10</sup> They argued that the directors "violated the Establishment Clause by organizing conferences at which faith-based organizations allegedly 'are singled out as being particularly worthy of federal funding'" and are favored over secular groups.<sup>11</sup> "The only asserted basis for standing was that the individual [plaintiffs were] federal taxpayers . . . 'opposed to the use of Congressional taxpayer appropriations to advance and promote religion.'"<sup>12</sup>

As a general rule, plaintiffs do not have standing to sue the government when the only harm alleged is that their federal taxes are being spent in an unconstitutional manner.<sup>13</sup> The plaintiffs in *Hein* claimed standing under an exception to the taxpayer standing prohibition that the Supreme Court created

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5. *Id.* at 2559–60 (plurality opinion).

6. *Id.*

7. *Id.* at 2560 (citation omitted).

8. *Id.*

9. *Id.* (citation omitted).

10. *Id.*

11. *Id.* at 2560–61.

12. *Id.* at 2561 (quoting Amended Complaint ¶ 10, *Freedom From Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006) (No. 04-C-381-S)).

13. *See supra* note 1.

in *Flast v. Cohen*.<sup>14</sup> In *Flast*, the Supreme Court held that federal taxpayers had standing to challenge exercises of congressional power under the Taxing and Spending Clause of Article I, Section 8 that allegedly violate the Establishment Clause of the First Amendment.<sup>15</sup>

The United States District Court for the Western District of Wisconsin held that the taxpayer-plaintiffs in *Hein* did not meet the *Flast* exception for standing and dismissed their claims.<sup>16</sup> The taxpayers, the court reasoned, were not challenging an exercise of congressional power, because the government directors acted "at the President's request and on the President's behalf" and were not "charged with the administration of a congressional program."<sup>17</sup> Insofar as the defendants' "actions did not represent congressional power," the *Flast* exception did not apply.<sup>18</sup>

The Seventh Circuit reversed.<sup>19</sup> Judge Posner authored the majority opinion, which held that the plaintiffs did have standing under the *Flast* exception because the challenged activities were "financed by a congressional appropriation."<sup>20</sup> Judge Posner reasoned that the *Flast* exception applied in all cases in which the allegedly unconstitutional government actions resulted in a net marginal cost to the taxpayer greater than zero.<sup>21</sup> Judge Ripple, in dissent, called the majority's position "a dramatic expansion of current standing doctrine."<sup>22</sup> The Court of Appeals denied en banc review, with Chief Judge Flaum noting that "the obvious tension which has evolved in this area of jurisprudence . . . can

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14. 392 U.S. 83 (1968).

15. *See id.* at 87–88.

16. Petition for a Writ of Certiorari app. A, at 34a–35a, *Freedom From Religion Found., Inc. v. Towey*, 433 F.3d 989 (7th Cir. 2006) (No. 04-C-381-S), available at <http://www.usdoj.gov/osg/briefs/2006/2pet/7pet/2006-0157.pet.aa.pdf>.

17. *Id.* at 33a–34a.

18. *Id.* at 34a.

19. *Freedom From Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006).

20. *Id.* at 997.

21. *See id.* at 995. Thus, in Judge Posner's formulation, taxpayers would lack standing to challenge references to religion in a State of the Union address, because the marginal cost of the references to the public is zero. *Id.* For Justice Alito's critique of Judge Posner's "zero-marginal-cost test," see *Hein*, 127 S. Ct. at 2570–71 (plurality opinion) (asserting that Judge Posner's solution is unworkable).

22. *Chao*, 433 F.3d at 997 (Ripple, J., dissenting).

only be resolved by the Supreme Court."<sup>23</sup> The Supreme Court granted certiorari to consider the standing question.<sup>24</sup>

In a 5-4 decision, the Supreme Court reversed the Seventh Circuit, holding that the taxpayer-plaintiffs lacked standing.<sup>25</sup> Justice Alito wrote for a plurality of the Court, joined by Chief Justice Roberts and Justice Kennedy.<sup>26</sup> Justices Scalia and Thomas concurred only in the judgment.<sup>27</sup>

Justice Alito first described why taxpayer status is generally an insufficient basis for standing. To have standing, he explained, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>28</sup> It is not enough for a plaintiff to allege a constitutional violation; the plaintiff must also have suffered some direct injury.<sup>29</sup> A federal taxpayer's interest in the expenditure of Treasury funds is "too generalized and attenuated to support Article III standing."<sup>30</sup> The injury is not particularized because "the interests of the taxpayer [in the allegedly unlawful expenditure] are, in essence, the interests of the public at large."<sup>31</sup> Accordingly, a taxpayer-plaintiff's claims are not justiciable because relief, if granted, would not be relief particular to the plaintiff.<sup>32</sup>

Justice Alito next examined whether the plaintiffs might still qualify for standing under the *Flast* exception to the "general constitutional prohibition against taxpayer standing."<sup>33</sup> *Flast* set

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23. *Freedom From Religion Foundation, Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (denying rehearing en banc) (Flaum, C.J., concurring).

24. *Hein*, 127 S. Ct. at 2561-62.

25. *Id.* at 2559.

26. *Id.*

27. *Id.* at 2573 (Scalia, J., concurring in the judgment).

28. *Id.* at 2562 (plurality opinion) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

29. *Id.* (citations omitted).

30. *Id.* at 2563.

31. *See id.*

32. *Id.* 2563-64 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992) ("[A] plaintiff . . . seeking relief . . . more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy.")). Justice Alito expended considerable ink driving this point home, quoting generously from six Supreme Court precedents spanning nine decades in support of the proposition that "generalized grievances brought by concerned citizens . . . are not cognizable in the federal courts." *Id.* at 2564 n.2 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (opinion by Kennedy, J.)).

33. *Hein*, 127 S. Ct. at 2564 (plurality opinion).

out a two-part test for determining whether taxpayers have standing to challenge allegedly unconstitutional expenditures: "First, the taxpayer must establish a logical link between that [taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that [taxpayer] status and the precise nature of the constitutional infringement alleged."<sup>34</sup> In *Flast*, the Court held that the taxpayer-plaintiffs had standing to challenge the expenditure of federal funds to religious schools under the Elementary and Secondary Education Act of 1965 that allegedly violated the Establishment Clause.<sup>35</sup> The *Flast* Court found the first part of the test was met because the plaintiffs challenged "an exercise by Congress of its power under Article I, Section 8, to spend for the general welfare, and the challenged program involve[d] a substantial expenditure of federal tax funds."<sup>36</sup> The Court found the second part of the test was also met because the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."<sup>37</sup> To reach this conclusion, Chief Justice Warren cited James Madison's writings as evidence that the Founders adopted the Establishment Clause for fear that "the taxing and spending power would be used to favor one religion over another or to support religion in general."<sup>38</sup>

Justice Alito's analysis focused on the first part of the *Flast* test. The conferences complained of were funded through "general appropriations to the Executive Branch to fund its day-to-day

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34. *Flast*, 392 U.S. at 102.

35. *Id.* at 85–86, 103.

36. *Id.* at 103.

37. *Id.* at 104.

38. *Id.* at 103. Chief Justice Warren quoted *Madison's Memorial and Remonstrance Against Religious Assessment*: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* (quoting 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)). Professor Carl H. Esbeck has argued that the Court in *Flast* viewed the Establishment Clause as providing a structural limit on government rather than conferring individual rights. Because it was structure-based and not rights-based, individual plaintiffs alleging government violation of the Establishment Clause would have difficulty meeting standing requirements. Therefore, the *Flast* Court, "in order that the courts could entertain the lawsuit and proceed to a resolution on the merits. . . . created a legal fiction of individualized 'taxpayer injury.'" Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & POL. 445, 456–58 (2002).

activities.<sup>39</sup> Thus, the taxpayers in *Hein* were not challenging any “specific congressional action or appropriation,” but, rather, general appropriations that Congress provided to the executive branch.<sup>40</sup> Because the allegedly unconstitutional expenditures were the result of “executive discretion, not congressional action,” Justice Alito concluded that the *Flast* exception did not apply.<sup>41</sup> Having distinguished *Flast*, Justice Alito declined Justice Scalia’s invitation to reconsider that decision: “We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.”<sup>42</sup>

Justice Kennedy concurred, noting that he “join[ed] [Justice Alito’s] opinion in full.”<sup>43</sup> Justice Kennedy focused on separation of powers concerns that he believed would be raised by extending *Flast*. Granting taxpayers standing to challenge public events and speeches by executive branch officials, he asserted, would stifle the “exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies [that] sustains a free society.”<sup>44</sup> Such far-reaching judicial intervention would lead to “a real danger of judicial oversight of executive duties.”<sup>45</sup>

Justice Scalia, joined by Justice Thomas, concurred in the judgment.<sup>46</sup> He criticized the plurality for creating “utterly meaningless distinctions.”<sup>47</sup> He called on his fellow Justices to “choose sides” by either applying *Flast* to “all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power,” or by overturning *Flast*.<sup>48</sup>

Justice Scalia criticized the *Flast* exception for departing from the “concrete and particularized injury” requirement for stand-

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39. *Hein*, 127 S. Ct. at 2566 (plurality opinion).

40. *Id.*

41. *Id.*

42. *Id.* at 2571–72.

43. *Id.* at 2572 (Kennedy, J., concurring).

44. *Id.* at 2572–73.

45. *Id.*

46. *Id.* at 2573.

47. *Id.* at 2573 (Scalia, J., concurring in the judgment). Whereas the plurality limited *Flast* to expenditures “expressly authorized or mandated by . . . specific congressional enactment,” *id.* at 2568 (plurality opinion), Justice Scalia saw “no intellectual justification” for the distinction because it had “nothing to do with whether the plaintiffs have alleged an injury in fact that is fairly traceable and likely to be redressed,” *id.* at 2579 (Scalia, J., concurring in the judgment).

48. *Id.* at 2573–74 (Scalia, J., concurring in the judgment).

ing.<sup>49</sup> According to Justice Scalia, *Flast* created a new kind of injury.<sup>50</sup> A taxpayer no longer had to show that a government action affected his tax liability. Instead, the taxpayer's assertion of mental displeasure at "'his tax money . . . being extracted and spent in violation of specific constitutional protections against such abuses of legislative power'" would be sufficient.<sup>51</sup> Justice Scalia decried the use of this "Psychic Injury" for two reasons. First, *Flast* did not adequately explain why this type of injury sufficed to establish Article III standing.<sup>52</sup> Second, the Court "never explained why Psychic Injury was *insufficient* in the cases in which standing was denied."<sup>53</sup> Because Justice Scalia believed Psychic Injury to be inconsistent with Article III standing, he called for overturning *Flast*.<sup>54</sup>

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49. *Id.* at 2574.

50. *See id.* at 2574, 2576. Focusing on the "injury in fact" prong of standing, *see* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (listing three minimal elements for standing, the first being a concrete and personalized "injury in fact"), Justice Scalia described two concepts of injury: "Wallet Injury" and "Psychic Injury," *id.* A plaintiff claiming Wallet Injury alleges that his "tax liability is higher than it would be, but for the allegedly unlawful government action." *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in the judgment). By contrast, Psychic Injury "consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner." *Id.* Standing doctrine has typically rejected Psychic Injury because it is neither concrete nor particular. *Id.* Taxpayer plaintiffs, left to Wallet Injury, have typically failed the "traceability and redressability prongs of standing": the taxpayer's tax bill is probably not higher because of the forbidden expenditure, and an injunction against the alleged misconduct would probably not result in any lower tax burden. *Id.* But *Flast* changed that by allowing Psychic Injury to be the basis for standing for the first time. *Id.* at 2576.

51. *Hein*, 127 S. Ct. at 2576 (Scalia, J., concurring in the judgment) (quoting *Flast*, 392 U.S. at 106).

52. *Id.* at 2575.

53. *Id.* at 2575 (emphasis added). Justice Scalia analyzed two pre-*Flast* cases in which taxpayer standing was denied. *See id.* at 2575–76. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), the Court denied standing to taxpayers on the grounds that the party seeking to demonstrate standing "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury[,] . . . and not merely that he suffers in some indefinite way in common with people generally." In *Doremus v. Board of Education*, 342 U.S. 429, 434–35 (1952), taxpayers were denied standing to challenge alleged Establishment Clause violations which *Flast* would later construe as involving the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" (as opposed to a challenge to a taxing and spending statute). *Flast*, 392 U.S. at 102–03.

54. *Hein*, 127 S. Ct. at 2582, 2584 (Scalia, J., concurring in the judgment) ("[A] taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner [is never] sufficiently concrete and particularized to support Article III standing . . .").

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented.<sup>55</sup> He argued that the plurality rested its decision on an arbitrary distinction between injury caused by the executive branch and injury caused by the legislative branch.<sup>56</sup> The injury in *Flast* was the “extraction and spending of tax money in aid of religion”; therefore, granting plaintiffs standing in such cases protects the “liberty of conscience,” the dissent contended.<sup>57</sup> In the present case, taxpayer money was funding conferences “alleged to have the purpose of promoting religion.”<sup>58</sup> Because Justice Souter believed the taxpayers “alleged the type of injury” that satisfies the *Flast* test, the dissent would have affirmed the Seventh Circuit’s decision to grant standing.<sup>59</sup>

The Supreme Court in *Hein* neither fully embraced taxpayer standing, as the dissenters urged, nor wholly abandoned the doctrine, as Justices Scalia and Thomas suggested. Instead, the Court took a minimalist approach that relied on a distinction between legislative and executive action.<sup>60</sup> The plurality claimed to find support for the legislative-executive distinction in the language of *Flast*, and advanced several policy arguments in defense of its position. In light of *Flast*’s broad language, however, the plurality’s narrow, minimalist interpretation of the taxpayer standing exception is ultimately unconvincing. Further, no amount of narrowing can resolve the *Flast* exception’s fundamental inconsistency with the Article III “case or controversy” requirement.<sup>61</sup> Unfortunately, although

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55. *Id.* at 2584 (Souter, J., dissenting).

56. *Id.*

57. *Id.* at 2585 (citations omitted).

58. *Id.*

59. *Id.* at 2588.

60. Although the Court held that the plaintiffs in *Hein* fell on the executive side of the executive-legislative distinction, future cases will have to resolve where the line will be drawn. Such litigation likely will focus on whether there has been sufficient congressional involvement and awareness. See Ira C. Lupu & Robert W. Tuttle, *Jay Hein, Director of the White House Office of Faith-Based and Community Initiatives v. Freedom From Religion Foundation, Inc.*, THE ROUNDTABLE ON RELIGION AND SOC WELFARE POL’Y, July 2, 2007, [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=60](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=60).

61. See, e.g., James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 122 (2001) (“Taxpayer standing is inconsistent with the Framers’ concept that the courts should be limited to judging individual grievances.”).

six of the nine Justices rejected the legislative-executive distinction<sup>62</sup> as arbitrary,<sup>63</sup> that distinction controls after *Hein*.<sup>64</sup>

The *Hein* Court focused on whether the taxpayer-plaintiffs satisfied the first part of the *Flast* test, the “logical link between [taxpayer] status and the type of legislative enactment attacked.”<sup>65</sup> Justice Alito used the facts of *Flast* to define the limits of what could be considered a sufficient logical link. The allegedly unconstitutional actions in *Flast* were “express congressional mandate[s]” and “specific congressional appropriation[s].”<sup>66</sup> By con-

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62. It may be more accurate to describe the distinction as an “express-implied” distinction, see *Hein*, 127 S. Ct. at 2580 (Scalia, J., concurring in the judgment), because what the plurality actually held is that taxpayers do not have standing to challenge government action absent a *specific* congressional appropriation and an *express* congressional mandate, *id.* at 2565–66 (plurality opinion). Nonetheless, the term “legislative-executive distinction,” while perhaps lacking precision, is more accessible inasmuch as it focuses on the reason why the plaintiffs in the instant case failed: because they were challenging “executive discretion, not congressional action.” *Id.* at 2566.

63. See *Hein*, 127 S. Ct. at 2580 (Scalia, J., concurring in the judgment) (“Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressibility.”); *id.* at 2584 (Souter, J., dissenting) (finding no support in logic or precedent for “clos[ing] the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury”); see also Posting of Steven K. Green to ACSBlog, <http://www.acsblog.org/bill-of-rights-guest-blogger-supreme-court-gives-the-president-immunity-from-many-establishment-clause-suits.html> (June 26, 2007, 09:54 EDT) (“[The plaintiffs were] successful in convincing six of the justices that limiting taxpayer standing to actions authorized by express congressional appropriations made no constitutional sense. Ironically, that argument which was the crux of the case, both won and lost.”).

64. Justice Alito’s opinion, because it supports the result and is decided on the narrowest grounds, is the controlling opinion. See *Marks v. United States*, 430 U.S. 188, 193 (1977); *Hein*, 127 S. Ct. at 2584 (Souter, J., dissenting) (referring to the plurality opinion as the “controlling” opinion). Justice Alito’s opinion is narrower than Justice Scalia’s concurrence because it does not overturn Supreme Court precedent. Justice Kennedy’s concurrence cannot be the controlling opinion because it purports to join Justice Alito’s opinion in full. See *id.* at 2572 (Kennedy, J., concurring). But see *Lupu & Tuttle*, *supra* note 60 (arguing that lower courts may treat Justice Kennedy’s opinion as the controlling opinion because it affirms *Flast*, while Justice Alito strongly suggests that *Flast* was wrongly decided).

65. *Flast*, 392 U.S. at 102.

66. *Hein*, 127 S. Ct. at 2565 (plurality opinion). Justice Alito used the phrases “express congressional mandate” and “specific congressional appropriation” (or their equivalents) three times to describe the facts of the *Flast* case, before ever applying them to the facts of *Hein*. “The expenditures at issue in *Flast* were made pursuant to an *express congressional mandate* and a *specific congressional appropriation*.” *Id.* (emphasis added). “The expenditures challenged in *Flast*, then, were funded by a *specific congressional appropriation* and were disbursed . . . pursuant to a *direct and unambiguous congressional mandate*.” *Id.* (emphasis added). “Given that the alleged . . . violation . . . was funded by a *specific*

trast, Justice Alito contended that the plaintiffs in *Hein* were challenging only *general appropriations* to the executive branch that “did not expressly authorize, direct, or even mention the expenditures of which respondents complain[ed].”<sup>67</sup>

As mentioned above, *Flast* should not be so narrowly construed. The *Flast* opinion itself did not seize on the presence of an “express congressional mandate” and “specific congressional appropriation” to hold that the first part of its two-part test was satisfied; it merely stated that “[the plaintiffs’] constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and that the challenged program involves a substantial expenditure of federal tax funds.”<sup>68</sup>

*Flast* was self-consciously ambiguous about the contours of its two-part test, leaving it to future courts to define the limits of the taxpayer standing doctrine.<sup>69</sup> *Flast*’s statement explaining the first part of the test is broad: “[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.”<sup>70</sup> Although general appropriations from Congress to the White House would seem to satisfy this requirement, Justice Alito found them insufficient to qualify as exercises of congressional power.<sup>71</sup>

Justice Alito supported his extrapolation of the *Flast* legislative-executive distinction, criticized by other Justices as tenuous,<sup>72</sup> with three additional arguments. First, confining the *Flast*

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*congressional appropriation* and was undertaken pursuant to an *express congressional mandate*, the Court concluded that the taxpayer-plaintiffs had established the requisite ‘logical link . . .’” *Id.* (emphasis added).

67. *Id.* at 2566.

68. *Flast*, 392 U.S. at 103.

69. *See id.* at 105 (“Whether the Constitution contains other specific limitations [beyond the Establishment Clause] can be determined only in the context of future cases.”).

70. *Id.* at 102.

71. *Hein*, 127 S. Ct. at 2566 (plurality opinion).

72. *See Hein*, 127 S. Ct. at 2580–81 (Scalia, J., concurring in the judgment) (“[T]he Court’s holding flatly contradicts *Kendrick*, . . . [which involved an] attack[] on executive discretion rather than congressional decision: Congress generally authorized the spending of tax funds for certain purposes but did not explicitly mandate that they be spent in the *unconstitutional* manner challenged by the taxpayers.”) (citing *Bowen v. Kendrick*, 487 U.S. 589, 620–22 (1988)). *But see* *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218–19 (D.C. Cir. 1976) (arguing that *Flast* opened the door for standing to challenge “taxing and appropriation statutes” but

exception to express congressional mandates and specific congressional appropriations would be consistent with the Court's pattern of construing the exception narrowly.<sup>73</sup> Second, the executive branch should not be subjected to a "wide swathe" of Establishment Clause challenges that would be judicially unworkable.<sup>74</sup> And third, allowing standing in *Hein* would "raise serious separation-of-powers concerns."<sup>75</sup>

These rationales fail to justify the legislative-executive distinction. First, dicta in various Supreme Court opinions calling for a narrow and rigorous interpretation of the taxpayer standing doctrine do not justify the imposition of an arbitrary limit.<sup>76</sup> Second, the standing doctrine is not a mechanism intended to limit frivolous lawsuits; rather, it is a device intended to ensure that the plaintiff is properly situated to bring his claim.<sup>77</sup> Even the *Flast* Court recognized this when it stated that "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."<sup>78</sup> Third, although judicial respect for the executive branch is a legitimate concern, that argument proves too much: deference is owed to both po-

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not "mere executive activity that entails some expenditures"); Debra L. Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651, 679 (2007) ("There is . . . a direct, reciprocal relationship between a taxpayer's status and Congress's exercise of its taxing and spending powers [that does not exist for the Executive Branch].").

73. "[W]e have repeatedly emphasized that the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein*, 127 S. Ct. at 2568 (plurality opinion) (citations omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 481 (1982); *United States v. Richardson*, 418 U.S. 166, 173 (1974)).

74. See *Hein*, 127 S. Ct. at 2569 (plurality opinion).

75. *Id.* at 2569–70.

76. See, e.g., *id.* at 2580 (Scalia, J., concurring in the judgment) (criticizing the plurality for failing to explain how its efforts to distinguish this case based on the facts in *Flast* are material to the question of taxpayer standing).

77. See *id.* at 2586 n.1 (Souter, J., dissenting) ("If these claims are frivolous on the merits, I fail to see the harm in dismissing them for failure to state a claim instead of for lack of jurisdiction. To the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason, much less a reason grounded in Article III, to keep them from being heard.")

78. *Flast*, 392 U.S. at 99.

litical branches.<sup>79</sup> Nonetheless, under *Flast*, such deference to separation of powers considerations does not negate standing in cases where the relevant money is specifically appropriated by the legislature. Justice Alito did not explain why separation of powers concerns were sufficient to preclude standing in *Hein* but were insufficient to overrule *Flast*.

Justice Alito appears to have strong reservations about the *Flast* exception. In addition to quoting precedent that called for limiting its holding,<sup>80</sup> he emphasized the precedent to which *Flast* was an exception.<sup>81</sup> Justice Alito criticized *Flast* for failing to recognize the separation of powers implications of its taxpayer standing doctrine.<sup>82</sup> Further, he suggested that *Flast* was a flawed decision by declining to "extend it to the limits of its logic."<sup>83</sup> Justice Kennedy, perhaps fearing that the plurality opinion could be read as a criticism and even rejection of *Flast*, felt the need to declare that he believes "*Flast* is correct and should not be called into question."<sup>84</sup>

All of which raises the question: if Justice Alito disagrees with the holding in *Flast*, why did he go to such great pains to argue that it did not apply, instead of closing the door on the taxpayer standing doctrine altogether? His opinion is a classic example of "judicial minimalism."<sup>85</sup> Rather than overrule *Flast*,<sup>86</sup> Justice

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79. See *Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting) (arguing that the plurality's separation of powers concerns apply no more to "Judicial Branch review of an executive decision [than they do to] judicial evaluation of a congressional one").

80. See *supra* note 73.

81. See *supra* note 32.

82. *Hein*, 127 S. Ct. at 2569 (plurality opinion).

83. *Id.* at 2572.

84. *Id.* at 2572 (Kennedy, J., concurring).

85. For a thorough description and defense of "minimalism" as a form of judicial decision-making, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Justice Alito's opinion is minimalist for two reasons. First, it is decided narrowly rather than broadly insofar as it neither extends *Flast* nor overrules it. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996). Second, it is not decided on basic standing principles. See *id.* at 20 ("[M]inimalists generally try to avoid issues of basic principle and instead attempt to reach *incompletely theorized agreements*."). Justice Alito, in ruling that *Flast* does not apply, did not appeal to the principles of standing doctrine. Rather, he took a fact-specific view of *Flast* and then refused to extend it beyond its facts. In this way, he brought Justice Kennedy on board, who made it clear in his concurrence that he would not agree to an overruling of *Flast*, but, primarily because of separation of powers concerns, would be uncomfortable finding standing in this case. See *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

86. Overruling *Flast* may have been impossible because of Justice Kennedy's position. See *Hein*, 127 S. Ct. 2572 (Kennedy, J., concurring).

Alito was content to allow lower courts to continue narrowly applying the *Flast* exception. After a few more minimalist Supreme Court decisions, taxpayer standing may finally suffer death by a thousand cuts. But minimalism in this case comes at a price—continued confusion regarding taxpayer standing.<sup>87</sup> For the foreseeable future, then, lower courts will continue to labor under two separate taxpayer standing doctrines: one for challenges to alleged congressional violations of the Establishment Clause, and one for all other constitutional challenges.<sup>88</sup>

The Establishment Clause exception to the general denial of taxpayer standing to challenge the constitutionality of government expenditures lives on as a peculiar anomaly wherein a plaintiff's individual stake in the outcome does not determine standing. The Court in *Hein* refused to require plaintiffs to meet the standing requirements that every other constitutional challenge must meet. In so doing, the Court missed an opportunity to bring much-needed consistency to taxpayer standing doctrine.

Joel Fifield

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87. Justice Alito maintained that his opinion would leave *Flast* untouched: "Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. . . . We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it." *Id.* at 2571–72 (plurality opinion). But the Seventh Circuit disagreed with Justice Alito's characterization of *Hein*: "Although the Supreme Court's plurality characterized its opinion as effecting no change in its view of the law of taxpayer standing," in fact *Hein* "clarified significantly the law of taxpayer standing for the lower federal courts." *Hinrichs v. Speaker of House of Representatives of In. Gen. Assembly*, 506 F.3d 584, 599 (7th Cir. 2007).

88. Referring to *Hein* and the Supreme Court's taxpayer standing jurisprudence, one federal judge has contended:

The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue. That is, it cannot continue to hold expressly that the injury in fact requirement is no different for Establishment Clause cases, while it implicitly assumes standing in cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse. This double standard must be corrected because, contrary to the standing rules cited above, it opens the courts' doors to a group of plaintiffs who have no complaint other than they dislike any government reference to God.

*Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., concurring).

